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Chairman: Mr. ZARIF (Islamic Republic of Iran)

CONTENTS

AGENDA ITEM 129: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION (continued)

ORGANIZATION OF WORK

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The meeting was called to order at 3.10 p.m.

AGENDA ITEM 129: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION (continued) (A/47/10, A/47/95, A/47/441-S/24559)

1. Mr. TUERK (Austria) said that progress towards the establishment of an international criminal jurisdiction was contingent on the development of international relations, which had improved tremendously during the previous years, although it would be an illusion to believe that the world had become a more peaceful place. At the same time, there was a growing awareness among the members of the international community that it was intolerable to let gross violations of human rights and of the norms of international humanitarian law, including war crimes and crimes against humanity, go unpunished. There was also a growing recognition of a common international responsibility to investigate such crimes and to see to it that their perpetrators were brought to justice. He wished to draw attention, in that regard, to the recent recommendation by the Council of Europe on the establishment of an international court to judge war crimes by means of a multilateral convention to be drafted by an international diplomatic conference convened under the auspices of the United Nations. His delegation had consistently supported the establishment of such an institution, since it seemed doubtful whether a code of crimes against the peace and security of mankind unaccompanied by an international jurisdiction would really have the desired effect. The lack of an international organ charged with the prosecution and trial of crimes of an international character constituted a gap to be filled in contemporary international relations. While his delegation had thus far expressed scepticism regarding the possibility of establishing such an organ in the near future, the international community had recently edged closer to that goal.

2. His delegation strongly advocated that the International Law Commission should be given a renewed mandate at the current session of the General Assembly to draft a statute for an international criminal court along the lines suggested in the report of the Working Group on an International Criminal Jurisdiction. An essential precondition for the establishment of such a court in the forseeable future would be a clear separation between the international legal instruments establishing the court and the draft Code of Crimes against the Peace and Security of Mankind, since it seemed even more difficult to achieve general agreement on the Code. The court's statute and the Code should therefore constitute separate instruments and a State should be able to become a party to the statute without thereby automatically becoming a party to the Code. His delegation, however, had certain doubts as to whether it should be left to the discretion of States to determine the crimes for which they would confer jurisdiction on the court. At least in its first phase, the draft Code might be elaborated as a code of conduct which might become a binding instrument later on. The Commission should therefore opt for a more modest initial approach and confine the court's jurisdiction to those crimes which were already defined in existing international conventions. The court's jurisdiction should only extend to individuals and the question of responsibility of States should be dealt with in another context.

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(Mr. Tuerk, Austria)

3. The Working Group's view that the court would essentially have to be a facility for States parties to its statute without having compulsory or exclusive jurisdiction and without being a full-time body was justified in that there seemed to be a choice between a court of a limited nature or no court at all. The broad international support required for the concept of an international criminal court, if such an institution was to serve any useful purpose, could only be achieved by adopting a modest but evolutionary approach which would permit the expansion and strengthening of the system in the light of the experience gained and the further development of international relations.

4. With respect to the structural and jurisdictional issues raised in the report of the Commission (A/47/10), his delegation believed that the only feasible method of establishing an international criminal court would be the conclusion of an international treaty containing its statute. Assuming that the court would not be a full-time body, judges might be chosen from an existing list, analogous to the procedure of the Permanent Court of Arbitration. The experience of, inter alia, the European Court of Human Rights, demonstrated that independence and impartiality were also guaranteed if a court was not composed of full-time judges. Such a part-time court would certainly need an appropriate administrative backup which could perhaps be provided by the Registry of the International Court of Justice. His delegation, however, did not favour an approach whereby the judges of that Court would also act as judges of an international criminal court, since the qualification and experience required for the respective tasks were quite different.

5. Even if, following the precedent of the International Court of Justice, the acceptance by States of the jurisdiction of an international criminal court were to be based on an optional clause, States should, nevertheless, be expected to at least recognize the jurisdiction of that court with respect to certain categories of offences which might be extended at a later stage. An ad hoc acceptance of the court's jurisdiction by States not parties to its statute would, of course, be highly desirable, but his delegation would prefer a system of compulsory jurisdiction.

6. The court's jurisdiction should be limited to crimes defined by treaties in force, which would thus invalidate any legal objections on account of the principle of the non-retroactivity of criminal law. Furthermore, the court should be competent to try only the most serious offences and not just any violation of the respective treaties, particularly since its jurisdiction would be predominantly concurrent with that of national courts. The problem of concurrent jurisdiction might be resolved by a stipulation that the international criminal court would only be activated if national courts did not institute proceedings, for instance, with regard to illicit trafficking in narcotics. The Special Rapporteur's suggestion that the international criminal court should have exclusive jurisdiction over certain specified crimes, such as genocide, would also be acceptable to his delegation. It did

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(Mr. Tuerk, Austria)

not, however, agree with the suggestion that the court should be given jurisdiction to review the decisions of national courts. The court might, nevertheless, be empowered to examine the decision of a national court with respect to conformity with the international court's statute.

7. The personal jurisdiction of an international court was one of the most difficult technical issues to be faced. The approach of the Working Group had been to build on the existing principle of jurisdiction under the various treaties and thus to provide that the court had personal jurisdiction in any case where a State party to the statute had lawful custody of an alleged offender, where that State had jurisdiction to try the offender and where it consented to the court exercising jurisdiction instead. The consent of the States concerned to the court's jurisdiction should not, however, be required in those cases where neither the State where the crime had been committed nor the State of nationality of the alleged offender instituted criminal proceedings. In such a case, the State party to the statute in whose territory the alleged offender had been found should be obliged to hand him over to the international criminal court.

8. With regard to the general rules of criminal procedure, an international criminal court would have to rely heavily on national law and the applicable international conventions. A defendant should therefore not be placed in a disadvantageous position simply because he was to be tried by an international court instead of a national court. That would not only hold true with respect to procedural questions, but also to the possible punishment. Furthermore, any State handing over an alleged offender to an international criminal court which would not have to apply the same kind of guarantees as a national court in conformity with that State's international obligations, such as the International Covenant on Civil and Political Rights, would be in breach of those obligations.

9. The Special Rapporteur's recommendation that the statute of a court should provide that transfer to the court was not to be regarded as extradition was an ingenious one which was acceptable to his delegation. The requirements laid down in international human rights instruments in favour of alleged offenders would, however, still have to be met. The question would therefore have to be appropriately resolved in the statute, particularly if it provided that a State which had accepted the jurisdiction of the court with respect to an offence was obliged to hand over an accused person to the court at the request of another State party which had accepted the same obligation.

10. The right to bring a case before an international criminal court should belong to those States that had ratified the statute. The appointment of an ad hoc prosecutor would seem to be a logical consequence of establishing a non-permanent court. Such prosecutors might be chosen by the court from a pre-established list upon consultation with the States immediately concerned. His delegation favoured an approach whereby such a prosecutor would be

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independent and would only issue a formal accusation once he had reached, on the basis of all available evidence, the conclusion that there was a case to answer.

11. With regard to the implementation of sentences, the Working Group had pointed out that the most obvious solution would be for sentences to be served in the penal institutions of the complaining State, under conditions not less favourable to the prisoner than those provided in the United Nations Minimum Standard Rules for the Treatment of Prisoners. Any other international standards accepted by that State should also be fully respected. While the establishment of an international prison facility seemed unrealistic, an international control commission, supervising the implementation of the sentence, was necessary.

12. An international criminal court should also be competent to decide on the question of compensation for the victims of the crime. In that regard, his delegation would not favour a solution providing for the competence of the International Court of Justice.

13. In view of the time factor, an international criminal court established on the basis of the work of the International Law Commission and the General Assembly would not be an appropriate forum for dealing with the numerous reports of atrocities perpetrated against unarmed civilians as well as the abhorrent practice of "ethnic cleansing" in areas of the former Yugoslavia. Serious consideration should therefore be given to the creation of an international ad hoc criminal jurisdiction to deal with the alleged war crimes and crimes against humanity committed in that country. The legal provisions in force in the territory at the time of the commission of those acts seemed to constitute a sufficient legal basis for action to be taken by an international ad hoc tribunal. Such a tribunal could be established by a treaty concluded by the most interested States. In drawing up the treaty the extremely useful deliberations of the International Law Commission on the subject of an international criminal court could serve as an important point of reference.

14. Repeated efforts had been made over the previous decades to provide for the punishment of the most serious crimes under international law. While those endeavours were still under way, the international community was nevertheless called upon to take immediate action regarding the gross violations of international norms in the territory of the former Yugoslavia. Such action should not consist solely of collecting relevant information. With regard to the future, an international criminal jurisdiction which would never need to operate would be the best proof that such an institution was serving its purpose.

15. Mr. PUISSOCHET (France) said that the question of establishing an international criminal court concerned some of the most pressing issues facing the international community. The frequent and grave violations of the laws of

(Mr. Puissochet, France)

war and of humanitarian law currently made it imperative to use the law to curb the commission of crime through fear of prosecution and punishment. His delegation therefore supported in principle the early elaboration by the International Law Commission of a draft statute of an international criminal court, in preference to any other approach. The alternative suggestions of international inquiry or fact-finding in some way linked to the trial of persons in a national court, or an official system of observing national trials, deserved further consideration provided that the elaboration of the draft statute of an international court was not thereby delayed. His delegation supported in general the basic propositions of the Working Group, contained in paragraph 396 of the report. It fully supported the view that the statute of the court should be established in the form of a treaty.

16. With regard to the structure and composition of the court, he was in favour of a flexible mechanism which would be "ad hoc not in the sense of an organ created ex-post facto but rather in the sense of a pre-existing mechanism which would be convened when the need arose, the composition of which would be determined, in each specific case, through objective criteria which would ensure the impartiality of the judges". (A/47/10, para. 33) Such an approach seemed to be favoured by a majority of States, since it would be better suited than a permanent organ to the types and volume of cases which would be submitted to the court. On the other hand, he was not in favour of the Working Group's suggestion of drawing inspiration from the system of lists of experts used by the Permanent Court of Arbitration.

17. The question of the composition of the court involved two aspects i.e. the appointment of its membership, on the one hand, and the composition of the court in a particular trial, on the other. On the question of the appointment of the membership, he shared the Working Group's suggestion that each State party to the Statute would nominate, for a prescribed term one qualified person to act as a judge of the court. The specificity of criminal law and the diversity of legal systems were arguments in favour of direct representation not of States but of national legal systems. With regard to the selection of judges in a particular trial, he considered that the States concerned should have the possibility of expressing their point of view. While no inter-State conflict was involved, Article 26, paragraph 2, of the Statute of the International Court of Justice and article 17 of its Rules could provide guidance on the matter. The Working Group's proposal that the President should appoint five judges who would be assisted by the Bureau seemed too rigid a formula.

18. On the question of whether the jurisdiction of the court should be compulsory or optional, his delegation supported the view of the Working Group that acceptance of the statute of the court would be distinct from acceptance of its jurisdiction. It agreed that acceptance of the statute should involve only financial and administrative obligations linked with participation in the operation of the court, while acceptance of the court's jurisdiction would take place in a separate and optional act, States being free to specify the

(Mr. Puissochet, France)

crimes in respect of which they accepted its jurisdiction. That second acceptance could take place either at the time of signature, or in a later declaration. It could be an ad hoc acceptance in relation to particular offences committed by specified persons, or could be made in advance for a specified category of offences which fell within the subject-matter jurisdiction of the court; in both cases the acceptance would relate only to persons who were "within jurisdiction" of the State concerned, in the criminal law sense. His delegation opposed the idea of establishing compulsory jurisdiction of the court for offences which, under its statute, would fall within its area of jurisdiction, or even over a limited number of such offences, since it was clear that it would be very difficult to reach agreement on a list of such offences.

19. His delegation supported the view that, since treaties relating to crimes regarded as "international" provided for the competence of national courts, the jurisdiction of the court should be concurrent with that of national courts. The Commission had rightly rejected the idea that the court could play the role of court of appeal against decisions of national courts.

20. On the question of the subject-matter jurisdiction of the court, his delegation believed that it was essential that the statute of the court and the draft Code of Crimes should remain completely separate instruments; it supported the idea of defining the jurisdiction of the court in relation to conventions in force. The instruments should include those that defined the crimes that most appalled the conscience of mankind, for example, the Genocide Convention or the Hague Conventions of 1949. Once a list of conventions had been drawn up, it would have to be determined whether in some cases, only the most serious crimes should be included in order to preserve the authority of the court.

21. The question of the personal jurisdiction of the court, from the practical point of view, was a matter of determining which States' consent was needed for the court to be able to exercise jurisdiction in respect of a particular person. Various States could be concerned in a case: the State in whose territory the crime was committed, the State of which the accused was a national and the State which had been, or whose nationals had been, victims of the crime. Competing interests had to be reconciled in that respect, particularly that of ensuring that a State did not assert its jurisdiction over the jurisdiction of the court solely in order to avoid all punishment for its nationals; ensuring that States were not forcibly deprived of the possibility of exercising the jurisdiction to which they were entitled under the conventions in force; and avoiding a system which would require the agreement of a State for one of its nationals to be brought before the court for an act which was not criminal under its internal law or under the rules of international law it recognized as such. The Commission should continue to study the question of the personal jurisdiction of the court. It was important that the consent of the State of nationality of the accused to the exercise of the jurisdiction of the court should be recognized as necessary,

(Mr. Puissochet, France)

regardless of where the crime was committed, if the person concerned was in the territory of that State.

22. On the question of applicable law, penalties and due process, his delegation agreed that with regard to the definition of crimes, the principle nullum crimen sine lege provided support for a system whereby the jurisdiction of the court would be limited to offences defined by the treaties in force specified in the statute, it being understood that it would be for each State party to ensure that the rules applied to the addressees. The question of the general rules of criminal law to be applied in proceedings must be considered in greater depth. Particular attention should be paid to determing the applicable law or laws, especially because of the impact it could have on the question of statutory limitations or the effects of amnesty measures adopted, for example, within the framework of the political settlement of a civil war situation.

23. The Commission would need to draw up more specific proposals with regard to the determination of penalties. The Working Group had referred to the need for a residual provision in the statute of the court, dealing with the question of penalties; obviously it must be ensured that the court did not prescribe penalties which violated human rights. He felt that the death penalty should be excluded. Furthermore, a "residual" system would be liable to undermine the unity of the court's practice. In some cases, depending on the rules for determination of applicable law that were selected, particular difficulties could result if there were many States in whose territory, or against whose nationals, the crime had been committed, or if many States instituted proceedings before the court in respect of the same crime and had taken the perpetrators into custody. His delegation supported the Commission's idea, in respect of due process, of referring to article 14 of the International Covenant on Civil and Political Rights, adding a reference to the double hearing principle.

24. On prosecution and related matters, his delegation supported the view that the court should not try defendants in absentia. As to the modalities of initiation of a case, it agreed that the right to initiate a case should be limited to States. It felt that the idea of limiting that right to a State whose consent was a prerequisite for the court's jurisdiction in a particular case was too narrow and would overrestrict the court's range of activities. However, the idea of allowing all States parties to the court's statute to initiate a case, even if such States did not accept the jurisdiction of the court with respect to the offence in question, would be too broad; a fortiori his delegation opposed the idea that a case could be initiated by any State, since it saw no reason to support an actio popularis of that type. It would therefore prefer the idea that the right to bring a complaint should extend to any State party which had accepted the court's jurisdiction with respect to the offence in question and to any State which had custody of the suspect and which would have jurisdiction under the relevant treaty to try the accused for the offence in its own courts. With regard to the system of prosecution, he

agreed that there should be no permanent prosecutorial organ, in view of the non-permanent nature of the court itself; the idea of establishing an independent prosecutorial system, which already existed in the criminal system in some States, should be kept under consideration.

25. The practical problems involved in bringing defendants before a court, particularly custody of the individual and security, had not really been taken up; it had perhaps been envisaged that they would be resolved on a case-by-case basis. However, to the extent that they could raise questions of principle, such as the basis on which the individuals concerned were kept in detention under the authority of the court in the territory of the State in which it operated, they needed to be kept in mind. The question had two particularly sensitive aspects, that of the limits which could be placed on an obligation to bring accused persons to court and that of the conflict between international jurisdiction and existing extradition regimes.

26. His delegation had no difficulty in accepting the idea that administrative links should be established between the court and the United Nations, while complying with the budgetary rules of the United Nations, or that the International Court of Justice, if it agreed, could provide services to the criminal court as required.

27. His delegation was in favor of drawing up a statute for an international criminal court and believed that that task should be a priority of the Commission. It was prepared to adopt the necessary mandate. His delegation had every confidence in the Commission's ability to find appropriate solutions.

28. Mr. CALERO RODRIGUES (Brazil) said that his delegation had consistently expressed doubts regarding the establishment of an international criminal court, not only because of the legal and practical difficulties involved, but also because it seemed unlikely that the court would receive from the international community the general support that would be necessary for it to be a meaningful institution. However, it believed that the Commssion should be requested to elaborate a draft statute for an international criminal court so that the General Assembly could take a decision at the appropriate time. It did not agree that it would be irresponsible to ask the Commission to prepare a draft statute while remaining uncommitted as to the outcome of that work. The Commission would carry out the technical legal work and the General Assembly would take the necessary political decisions. If the international community was able to reach broad agreement on a draft Code of Crimes and on a well-structured court, his delegation might be in a position to join such a consensus. The eleboration of the statute should not be dissociated from the work on the draft Code of Crimes. A criminal court must rely on a clear, unambiguous indication of the rules it must apply so that it could ascertain whether an individual had committed acts which the law defined as a crime and could impose on the individual the penalty indicated by the law. The Code of Crimes must therefore define crimes and set penalties. In paragraph 449 of the report, the Working Group suggested that the court's jurisdiction should

(Mr. Calero Rodrigues, Brazil)

extend to specified existing international treaties creating crimes of an international character. The problem there, besides that of selecting the instruments, was that the instruments in question did not indicate penalties. The Working Group noted in paragraph 502 of the report that the court would have to rely on applicable national law, or on principles common to all nations, and suggested that a residual provision might be needed in the statute, dealing with the question of penalties. His delegation did not see how national law could be invoked, which national law would be implied, or which principles common to all nations could be found for the determination of penalties. An authorization given to the court to have recourse to those two sources would in fact be an authorization for the court to apply the penalty it thought adequate; such action would contravene the principle *nulla poena sine lege* which was embodied in article 15 of the International Covenant on Civil and Political Rights and was a fundamental principle of criminal law. A properly drafted Code of Crimes would presumably include all the crimes that, due to their seriousness, should fall under the jurisdiction of the court: consequently, reference to other instruments would become unnecessary.

29. The question of the basis on which the Commission should undertake the project seemed rhetorical in nature since the report of the Working Group analysed a very large number of issues and suggested an even larger number of possible solutions. His delegation had no problem with the idea of a facility or an available legal mechanism which would be called into operation by States if and when they felt it necessary, rather than a more substantial institution, since doubts were likely to remain as to the possibility of the effective operation of an international criminal court. As to the suggestion that the court should not have compulsory jurisdiction and that its jurisdiction would be predominantly or entirely concurrent with that of national courts, his delegation foresaw considerable difficulties in establishing a coherent system of conferment of jurisdiction and of ensuring that there were no conflicts between the jurisdiction of the court and national jurisdictions. Difficulties were likely to arise whatever the approach taken; his delegation therefore felt that it would be pointless to suggest modifications to the basis that the Commission intended to adopt for the elaboration of the statute; as the work developed, the General Assembly and the Commission would be able to see whether the basis adopted was allowing the desired progress. Thus the Commission should proceed on the basis of its own choice, as outlined in its report.

30. Mr. SHEARER (Australia) said that Australia had already indicated its support of the proposal to establish an international criminal court, and specifically of directing the Commission, as the latter itself had requested, to proceed with the preparation of a draft statute.

31. The question arose as to whether other factors such as conflicting national policies, constitutional inhibitions and diversified standards, which had impeded the establishment of an international criminal court for some 40 years, still applied. The end of the cold war, interdependence among

(Mr. Shearer, Australia)

States and recent examples of armed conflict all led to the conclusion that the creation of an international criminal jurisdiction was now feasible. The approach outlined by the Working Group had several features which his delegation considered to be of particular importance, including the separation between the statute of the court and the draft Code of Crimes against the Peace and Security of Mankind and the proposals that in the first phase of its operations, at least, a court should exercise jurisdiction only over private persons, as distinct from States, that its jurisdiction should be voluntary and concurrent with that of national courts and that the court itself should not be a standing full-time body.

32. With regard to the subject-matter jurisdiction, Australia generally supported the Working Group's approach. The offences subject to the jurisdiction of the court should be those defined in existing international treaties, including the draft Code of Crimes, subject to its adoption and entry into force.

33. The question of illicit trafficking in narcotic drugs should be approached along the lines suggested by the Working Group in paragraph 450 of document A/47/10. The court should not be overwhelmed with routine cases. The concept of a "large-scale" narcotics offence should be interpreted in a flexible manner, taking into consideration the ability of the State whose interests were most affected by such offences to deal with them itself. The international criminal court should be empowered to exercise discretion in responding to requests from affected States.

34. The personal jurisdiction of the court required more detailed consideration. In principle, the notion of "ceded jurisdiction" appeared to be applicable to the proposed scheme, in that the court would exercise concurrent, not exclusive, jurisdiction. The cases described in paragraphs 454 and 455 of the report were likely to be the more common forms of ceded jurisdiction and should not require the consent of any other State, not even the State of nationality of the alleged offender. In cases where the State ceding jurisdiction was neither the State in whose territory the offence had been committed nor the State of nationality of the offender, but whose title to prosecute rested on some other connection, or on mere custody, the consent of the territorial State or the State of nationality should be required only if those States had agreed to prosecute in the event of extradition.

35. As to the question of an international criminal trial mechanism other than a court, it might not be appropriate, for the reasons outlined in paragraphs 473 to 487 of the report, to provide for such an institution in the statute of the court. Consideration might be given, however, to making provision in the draft Code of Crimes for an international fact-finding body of the kind contemplated in article 90 of Additional Protocol I of 1977 to the Geneva Conventions of 1949. If the international criminal court was prevented from trying offences against the Code by the failure of the relevant States to

(Mr. Shearer, Australia)

accept its statute, the fact-finding facility would constitute a potent means through which the international community could express its concern. Moreover, there did not appear to be such strong reasons as in the case of Additional Protocol I for making the competence of a fact-finding body dependent on the consent of interested States.

36. The question of bringing defendants before a court, and the constitutional inability of some States to surrender their own nationals, had been referred to in the Working Group's report, but not resolved. It might possibly be resolved on the basis that surrender to an international court was not, strictly speaking, extradition, or by treating the court as sui generis. Alternatively, there could be a prior agreement that if a State surrendered a defendant of its nationality for trial, or agreed to the surrender of its national by another State, that defendant would, if convicted, be returned to the national State for execution of sentence.

37. With regard to the implementation of sentences, there was an additional consideration, namely, the possibility that the imprisonment of an offender in a foreign country where there could be differences in language, climate, culture and social and economic conditions, might constitute a supplementary, gratuitous punishment unrelated to the offence. That had led a number of countries in recent years to conclude mutual repatriation agreements covering nationals of one State who were convicted and sentenced in the courts of the other State. Accordingly, consideration might be given to including in the draft statute a provision allowing the State of nationality of the convicted offender to implement the sentence, if it so wished.

38. His delegation reaffirmed its strong support for the proposal that the Commission should be given a clear mandate to proceed with the preparation of a draft statute of an international criminal court along the lines indicated in the report of the Working Group. In view of the importance of that task, it should be undertaken as a separate item in the Commission's work programme.

39. Mr. PASTOR RIDRUEJO (Spain) said, that with regard to the proposed establishment of an international criminal court, his delegation shared the views expressed by the United Kingdom representative on behalf of the States members of the European Community. Spain firmly supported the creation of such a court, not only because it would allow for compensation for international crimes, but also because its very existence would have a considerable dissuasive effect. What was now happening in some regions of the world made it clear that neither the principle of conferring universal criminal jurisdiction on the courts of all States nor the existing machinery for international judicial assistance was an adequate solution to the problem of prosecuting persons accused of international crimes. The international community could not be a passive onlooker in the light of such events.

40. While the establishment of an international criminal court would entail both political and technical difficulties, they could be overcome through a

(Mr. Pastor Ridruejo, Spain)

combination of political will, imagination and caution. His delegation noted with satisfaction that the Working Group's general approach reflected those attributes.

41. As noted in paragraph 437 of the report, an international criminal court would be created by a treaty concluded under the auspices of the United Nations. It was important for the court to benefit from the universal representativeness which the Organization enjoyed. In that connection, he drew attention to the problem of determining the number of ratifications or accessions, as appropriate, required for the entry into force of the statute. The number should be neither so low as to detract from the court's representativeness nor so high as to delay unduly the commencement of its functions.

42. Spain agreed with the Working Group's recommendation in paragraph 396 of the report that in the first phase of its operations, at least, the court should not be a standing full-time body. In the future, however, consideration could be given, in the light of experience, to setting up a permanent structure.

43. Likewise, in line with the notion of gradualism, which his delegation supported, the Working Group had proposed that in the first phase of its operations, at least, the Court should not have compulsory jurisdiction. His delegation noted that the European Convention on Human Rights of 1950 also provided for a system of voluntary jurisdiction.

44. Spain also endorsed the recommendation that in the first phase of its operations, at least, the court should exercise jurisdiction only over private persons, as distinct from States.

45. Turning to the question of the international offences over which the court could exercise jurisdiction (A/47/10, para. 449), he said that the Working Group's recommendation that the crimes dealt with should be those specified in existing international treaties, including the draft Code of Crimes, satisfied the principle nullum crimen sine lege.

46. Many other issues of great political and technical complexity had been considered by the International Law Commission and discussed in the Working Group's report. His delegation hoped that, at the current session, the General Assembly would give the Commission a clear mandate to prepare a draft statute of an international criminal court, taking into account the views expressed by Governments.

47. Mr. CISSE (Senegal) said that the International Law Commission had completed the first stage of the task entrusted to it, namely, to undertake a detailed study of the questions relating to the establishment of an international criminal jurisdiction. However, in order to proceed with the second stage - the preparation of a draft statute giving an international

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(Mr. Cisse, Senegal)

criminal court jurisdiction over crimes whose perpetrators could not be prosecuted and punished through the means traditionally available to States - the Commission required a clear mandate and guidelines from the international community.

48. Differing views had been expressed in the Commission as to whether the court should be a standing full-time body. The mechanism proposed was one which could be called into operation as required. While that principle was acceptable, his delegation found it difficult to conceive of a court, even one functioning periodically, which would not require a permanent administrative staff, if only to perform registry services and to maintain archives.

49. With regard to the jurisdiction of the court, his delegation believed that it should be exercised only over private persons. The question of the consent of the State of nationality or the territorial State should be considered carefully, with a view to ensuring the impartiality of the court's decisions.

50. As to the subject-matter jurisdiction his delegation believed that it should be limited to the crimes specified in existing international treaties, even though the court's jurisdiction might then not extend to new types of international crimes.

51. Concerning the relationship between the draft Code of Crimes and an international criminal court, his delegation endorsed the view, expressed in paragraphs 462 and 463 of the report, that a State could become a party to the statute without thereby becoming a party to the Code. That would ensure maximum flexibility. Likewise, his delegation held that, regardless of the linkages between them, the statute of a court and the draft Code of Crimes should constitute separate instruments. The General Assembly had, however, underscored those linkages by deciding that the statute of a court and the draft Code of Crimes should be dealt with in the same report. Moreover, the the preparation of a draft statute had been placed in abeyance until one of the most important crimes mentioned in the draft Code, aggression, had been defined. Since many of the offences defined in the draft Code, such as apartheid, State-sponsored terrorism, war crimes, ordered by the leaders of a State and so on, could be tried only by an international criminal court, the Assembly had intended that work on the two topics should proceed concurrently. For that reason, his delegation did not agree with the conclusions set out in paragraph 461 of the report.

52. One of the most difficult questions which the International Law Commission would have to resolve pertained to the relationship between an international criminal court and the Security Council, in view of the Council's responsibilities under the Charter of the United Nations with regard to the maintenance of international peace and security. Conflicts of jurisdiction between the court and the Council should be avoided.

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53. Mr. SHI Jiuyang (China) said the establishment of an international criminal court would no doubt be desirable as a form of international cooperation to combat the scourge of international and transnational crime. Desirability, however, did not necessarily translate into feasibility. Any effort to establish such a court would, at the current stage of international relations, run into numerous insurmountable practical difficulties.

54. First, States would as a rule insist on trying the alleged offender in their domestic courts, being reluctant to surrender their criminal jurisdiction or see it diminished. It would be recalled that the International Conventions on the Prevention and Punishment of the Crime of Genocide and on the Suppression and Punishment of the Crime of Apartheid, while envisaging the possibility of trying those crimes before an international criminal tribunal, did not contain any specific provisions for the establishment of such tribunals. The 1953 draft statute for an international criminal court had, for various reasons, been shelved. The most that countries had so far been able to agree on in their joint efforts to combat certain international crimes was universal jurisdiction in the form of "try or extradite".

55. Referring to the view that the changed climate in international relations had brought the idea of an international criminal court closer to fruition, he said that while the possibility of establishing such a court might indeed be slightly greater under the existing circumstances, guaranteeing the independence and impartiality of the court would probably be more difficult, given their susceptibility to the influence of the dynamics of international politics. The problem was not amenable to solution by provisions relating to the court's composition and rules of procedure or to general principles of criminal justice.

56. Should the establishment of an international criminal court nevertheless prove possible, its jurisdiction *ratione personae* should without doubt apply only to individuals and its jurisdiction *ratione materiae* should not cover ordinary crimes but should be confined to those constituting the most serious threat to human civilization, such as aggression, apartheid, genocide, State terrorism, serious breaches of the laws of war and serious cases of international drug trafficking. Even then, bringing the accused to trial before the court would encounter serious practical difficulties because most of the crimes mentioned, with the exception of war crimes and international drug trafficking, could only be perpetrated by States. Although criminal responsibility was borne by individuals, those individuals would most likely be members of the State ruling hierarchy. The court could not try the alleged offenders *in absentia*, since that would violate the basic principles of criminal justice as well as the provisions of the International Covenant on Civil and Political Rights. How could a State, even if it was a party to the court's Statute and if the court exercised exclusive and compulsory jurisdiction over the crime in question, be expected to turn over its Head of State or Government or other high-ranking civilian or military leader to the

(Mr. Shi Jiuyang, China)

court for trial? His delegation shared the view that the example of the Nürnberg and Tokyo Tribunals was not relevant because of their ad hoc nature and because they had been set up under the special international circumstances prevailing at the time. To apprehend fugitive offenders responsible for international crimes and bring them to justice would be virtually impossible without the use of force involving much suffering for the innocent people of the country concerned.

57. Moreover, differences between national criminal justice systems and national philosophies on the subject of penalties would make it extremely difficult to draw up universally acceptable uniform rules on the sentencing of international crimes. If left unresolved, that issue alone could render the proposal for an international criminal court ineffective. Difficulties also arose in connection with the execution of judgements and the enforcement of penalties.

58. The foregoing were only a few examples of the numerous thorny problems connected with the issue. Noting that the Working Group set up at the forty-fourth session to consider the topic had put forward various alternative proposals but that, for internal reasons, the Commission had not formally adopted the Working Group's report, he said that his delegation did not propose to comment on that report at the current stage. It also felt the need to study further the proposals of the Working Group set out in paragraph 396 of the Commission's report which, as stated in paragraph 104 of the report, the Commission had accepted as a basis for its future work. His preliminary impression was that the propositions showed awareness of the extremely sensitive and complex nature of the main issues involved and of the many difficulties involved. The basic approach adopted by the Working Group therefore seemed prudent and the preliminary goals set demonstrated moderation and a desire to take international realities into account. Pending detailed study of the recommendations contained in the report, his delegation could not make any further comments beyond reiterating its appreciation of the Commission's and the Working Group's efforts. It had also not yet formed a definitive opinion on the Commission's conclusion, set out in paragraph 104 (c) of the report, that further work on the issue required a renewed mandate from the General Assembly and needed to take the form of preparing a draft statute. His delegation was ready to join in consultations with a view to reaching a consensus acceptable to all delegations.

59. Mr. RAO (India) remarked that the recommendations of the Working Group appeared to fall short of expectations. Referring specifically to the basic propositions set out in paragraph 396 of the report, he said that his delegation agreed with proposition (i), namely, that an international criminal court should be established by a statute in the form of a treaty agreed to by States parties. The statute should be drawn up by the International Law Commission and adopted by the General Assembly as a resolution or, alternatively, by a conference of States convened for the purpose. The court thus established should be associated with the United Nations, which would

(Mr. Rao, India)

exercise some form of supervision over it as it did in the case of the International Court of Justice. While agreeing with proposition (ii) that the Court should exercise jurisdiction only over private persons, his delegation wished to emphasize that all the safeguards of law, including due process, provided in the human rights instruments should be accorded to individuals accused of international crimes to be tried by the court. The linkage between the draft Code and the court should, in his delegation's view, be closer than was envisaged in proposition (iii), crimes of an international character defined in other specific conventions being brought within the purview of the court through suitable provisions included in its statute.

60. His delegation endorsed proposition (iv) but, while agreeing that proposition (v) was a logical outcome of the Working Group's assumption that a full-time permanent court would be expensive and politically not very attractive, felt that those assumptions had to be weighed against considerations of the need to ensure impartiality, objectivity and uniformity of jurisprudence. As to the other jurisdictional mechanisms referred to in proposition (vi), his delegation felt that reference to such mechanisms appeared to be unnecessary and indeed inconsistent with the proposition that the jurisdiction of the court should be consensual and should be in the form of a statute adopted by a treaty.

61. With regard to proposition (vii), his delegation was pleased to note the emphasis placed on the need to guarantee due process, independence and impartiality in the court's procedures. However, it strongly felt that those goals could best be achieved through the establishment of a full-time permanent body with a statute based on general principles of criminal justice accepted by the majority of States.

62. Referring to the Working Group's recommendation for an ad hoc independent prosecutorial system (paragraph 509 of the report), he said that the office of prosecutor should also be established as a permanent body with a view to avoiding possible abuses of the international criminal jurisdiction. A permanent prosecutorial office would also serve as a valuable bridge between the court and the Security Council in respect of crimes of aggression and others connected with the maintenance of international peace and security.

63. Noting that the issues raised in the Working Group's report required careful study by States as well as by the Commission itself at an appropriate time, he said that his delegation reserved its position on those issues pending further examination.

64. The Commission's decision and conclusions as set out in paragraph 104 of the report amounted to a specific proposal which essentially promoted an ad hoc mechanism. His delegation, as already stated, would prefer a full time permanent mechanism and was not entirely convinced by the arguments opposing such a solution on financial grounds. It believed that, given the political will to refer criminal cases to an international court, a way would be found

(Mr. Rao, India)

to obtain the necessary finances. In order to ensure the court's impartiality and independence, States should not - and, surely, would not - object to the financial costs involved. The needs of economy could to some extent be met by reducing the number of judges and by establishing the court in a country with a relatively low cost of living and relatively inexpensive infrastructure facilities. The central theme of the proposal should be that States parties would be given the option to accept the jurisdiction of the court on a consensual rather than a compulsory basis, and that the court's jurisdiction would, in the initial stages at least, be restricted to trying individuals only. The court should be integrally linked with the United Nations system, and its mandate in a given case should be organized to complement the powers and functions of the Security Council in the sphere of maintenance of international peace and security. The court should not be projected as a mechanism to bypass or in any way to rival or challenge the role of the Security Council. In other words, its powers and functions should be similar to those of the International Court of Justice.

65. In conclusion, he expressed full agreement with the Commission's view that the general debate stage on the topic was now over. He doubted, however, whether the Sixth Committee was yet in a position to endorse the Commission's proposal in all respects and to mandate the Commission to produce a statute on the proposed basis. His own delegation certainly had some reservations with regard to the proposal. A consensus would have to be achieved before a specific mandate could be given to the Commission. His delegation was prepared to join in any effort to identify that consensus in the hope that its ideas would be given due consideration.

66. Mr. GODET (Observer for Switzerland) said that the recent conflicts had demonstrated the urgent need for a code of crimes against the peace and security of mankind whose fundamental purpose would be to criminalize the actions of those who deliberately jeopardized the peace and security to which mankind was entitled. Reasons of State or obedience to orders could not justify everything, and there were certain acts that could not remain unpunished. It was only proper that individuals whose behaviour met with universal reprehension should be personally accountable for their acts before a national or international jurisdiction. The International Law Commission's work on the preparation of the draft Code was well advanced: it had provisionally adopted a set of draft articles, on first reading and his Government would submit its written observations thereon before 1 January 1993, as requested.

67. Clearly, the preparation of the draft Code was linked to, although not indissociable from, the question of establishing an international criminal jurisdiction, in respect of which the Commission had made considerable progress. The Working Group established by the Commission had put forward a number of propositions on the structure of such a jurisdiction, which the Commission had deemed workable, as it had decided that further work on the issue should focus on a detailed project in the form of a draft statute (A/47/10, para. 104).

(Mr. Godet, Observer, Switzerland)

68. His delegation recognized the need for an international criminal jurisdiction, in particular in cases in which the State called upon to exercise its jurisdiction refused or was unable to prosecute or extradite persons guilty of international crimes. There was no need for such a court to be a permanent full-time body; it should rather be a permanent mechanism which could be convened immediately when necessary. However, the court should have a permanent seat, and should not sit, as the Working Group suggested, in the State in which the alleged offence had been committed, as it might thus be subject to pressure incompatible with the sound administration of justice. The idea of a regional criminal court did not seem compatible with the universal vocation of a jurisdiction set up to try international crimes.

69. The jurisdiction of the future court should be subsidiary to or at the most concurrent with that of national courts. It would be unfortunate to depreciate or even disrupt domestic punitive measures or to weaken the judgements handed down by national courts. It would be paradoxical if the very existence of a court, because of its exclusive jurisdiction, were to demobilize the State judicial authorities who were primarily responsible for punishing international crimes, as the objective was to ensure that such crimes did not remain unpunished. It was also possible to consider entrusting the court with the additional task of deciding conflicts of jurisdiction, either positive or negative, between States. Moreover, the General Assembly had given the Commission a mandate to consider not only the possibility of establishing "an international criminal court" but also the possibility of establishing "another international criminal trial mechanism", the idea being that it was appropriate, parallel to the efforts to establish a court, to reinforce the exercise of national criminal jurisdiction in the case of international crimes. Mechanisms such as a reference procedure, which allowed a national court trying an international crime to ensure that it duly applied the relevant provisions of international law, or an international pre-trial procedure, whereby certain forms of state behaviour could be classified within a given category of international crimes, undoubtedly deserved further consideration, and the Commission's reflections offered interesting prospects in that respect.

70. Most of the members of the Commission seemed to consider that once the principal of subsidiary or concurrent jurisdiction had been accepted, a flexible system should be provided for, whereby ratification of or accession to the court's statute would not *ipso facto* entail acceptance of the court's jurisdiction with regard to every crime. States parties would be free to specify the crimes or categories of crimes for which they accepted the court's jurisdiction. Although that was undoubtedly a realistic approach, it might be wondered whether the optional nature of the jurisdiction was in conformity with the extreme seriousness of the crimes the court would have to deal with, and his delegation had not yet made up its mind on that point.

71. The Commission had carefully considered whether the jurisdiction of the court should be restricted to the crimes defined by the draft Code of Crimes.

(Mr. Godet, Observer, Switzerland)

While strictly speaking, there was no link between the Code and the court's jurisdiction, it was open to question whether that jurisdiction should also extend to acts defined as crimes in other international conventions. Observance of the principle nulla poena sine lege signified that the norm to be implemented needed to be sufficiently precise to provide a basis for a charge. Accordingly, it was necessary to ensure that the crimes defined in certain conventions examined by the Commission met that requirement. Moreover, as the Commission had observed (A/47/10, para. 493), in accordance with the principle nullum crimen sine lege, the alleged wrong-doer must have been obligated to observe the rule in question. It was not sufficient that the rule existed in an inter-State relationship, which in principle created rights and obligations for subjects of international law only; the accused person must have been an addressee of the rule concerned. His delegation was not certain that international conventions other than the Code that would come within the subject-matter jurisdiction of the Court met that requirement. Although the draft Code covered some offences that were not devoid of political controversy, it satisfied the criteria of certainty and predictability without which the penalty would be tainted by arbitrariness and would infringe the fundamental rights of the defence. That concern also raised doubt as to whether the court would be able to base a conviction on international custom or General Assembly resolutions, most of which did not directly address individuals and were not coercive in character. For the same reasons, his delegation could not accept the idea that the subject-matter jurisdiction of the court could extend to offences against general international law which had not yet been incorporated into or defined by existing treaties. Only positive treaty law could provide a foundation for the court's authority to try cases.

72. Questions of personal jurisdiction would be among the most arduous to solve, as positive or negative conflicts of jurisdiction were likely to arise. Although the Working Group had not felt the need to go into detail, that task would sooner or later have to be undertaken. At first sight the view that the State of which the accused was a national could not prevent the court from exercising its jurisdiction unless it was prepared to prosecute him before its own courts appeared satisfactory.

73. Every accused person should be entitled to have his case reviewed by a higher court, in accordance with article 14, paragraph 5, of the International Covenant on Civil and Political Rights, which was in general observed at the national level. There was no need for the appeal jurisdiction completely to re-examine a case from the standpoint of both the merits and the law; it could merely ensure that correct procedure had been followed and that the law had been observed.

74. His delegation had noted with interest the suggestions made by the Working Group concerning the manner in which criminal proceedings might be brought before an international court, but would refrain from making any observations at the current stage as the suggestions were only exploratory.

75. Mr. NJENGA (Observer for the Asian-African Legal Consultative Committee (AALCC)) said that the Sixth Committee and AALCC shared a common objective in the progressive development and codification of international law, and that AALCC's modest contribution had always reflected the aspirations of the African and Asian States. The links between AALCC and the Sixth Committee, formalized in 1981, had subsequently become further consolidated, and AALCC had supplemented the efforts of the United Nations, particularly in connection with projects and studies relating to the Decade of International Law, international protection for refugees, international economic cooperation for development and the United Nations Conference on Environment and Development. AALCC had also undertaken to prepare notes and comments on the items on the Sixth Committee's agenda.

76. AALCC had likewise established close links with the International Court of Justice. The AALCC secretariat had prepared a brief on the possible wider use of the International Court, and circulated as document A/40/682, annex, and in 1986 AALCC had organized a colloquium on that subject for the benefit of the legal advisers of its member States. AALCC had always attached great significance to the question of the peaceful settlement of disputes and against the backdrop of the United Nations Decade of International Law, had held a meeting of the legal advisers of its member States on that subject on 8 November 1991.

77. The relations between AALCC and the International Law Commission dated back to 1956, when AALCC had undertaken a systematic examination of the Commission's work from the Asian-African perspective, and AALCC was gratified that the Commission had treated its recommendations with respect and reflected them in its work. At its thirty-first session, in 1992, AALCC had been honoured by the presence of the then Chairman of the Commission, Mr. Koroma, who had given a comprehensive overview of the progress of the Commission's work. In turn, AALCC had been represented by its Secretary-General at the Commission's 1992 session. At its thirty-first session, AALCC had urged the Commission to consider including in its programme of work an item on the legal aspects of the protection of the environment not subject to international jurisdiction (Global Commons) and an item on the progressive development of the concept of the reservation of the international sea-bed area for peaceful purposes. He hoped that those ideas would be taken up in due course.

78. AALCC had also been following with keen interest the progressive development of international law relating to the status and treatment of refugees and in 1991 had organized, in collaboration with UNHCR, a workshop on international refugee and humanitarian law, at which grave concern had been expressed about the situation of internally displaced persons who were in a refugee-like situation, but were not covered by the protection of regional and international legal instruments. The workshop had also emphasized the need for the State of origin to extend all possible humanitarian assistance to such persons and for international humanitarian organizations, including UNHCR, to be allowed to extend their help to them. The workshop had also recommended that AALCC should consider the possibility of preparing draft model legislation to serve as a guideline for the enactment of national laws

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(Mr. Njenga)

relating to refugees, a recommendation that had been endorsed by AALCC at its thirty-first session.

79. Concern about hazardous and toxic wastes and their disposal had led to the convening of the United Nations Conference on Environment and Development. The AALCC secretariat had been represented at most sessions of the Preparatory Committee as well as at the Conference itself, the prime objective being to assist its member States to prepare for the United Nations Convention on Environment and Development. In that connection, it had decided to convene a meeting of legal advisers of member States at United Nations Headquarters to strengthen their efforts to meet the objectives of the Conference and the international instruments adopted there.

80. The Trade Law Subcommittee of AALCC constantly reviewed activities in its field and the relations established with UNICTRAL had led to fruitful and effective cooperation, exemplified by AALCC's adoption of an integrated scheme for the settlement of disputes. At its thirty-first session AALCC had also recognized the importance of the relationship between economic development and the harmonization of legal regimes concerned with international trade through the sharing of accumulated experience; a data collection unit had been established at AALCC headquarters at New Delhi, which was expected to lead to the establishment of an autonomous centre for research and the development of legal regimes applicable to the economic activities of developing countries.

81. There were likewise other items on the AALCC secretariat's work programme which complemented the items on the Sixth Committee's agenda: they included the Indian Ocean as a zone of peace, international terrorism, legal elements of friendly and good neighbourly relations, the non-navigational uses of international rivers, the responsibility and accountability of the former colonial Powers, and the United Nations Decade for International Law. In connection with the last topic, AALCC had submitted a report to the Office of the Legal Counsel pursuant to General Assembly resolution 46/53.

ORGANIZATION OF WORK

82. The CHAIRMAN said that he had received a request from the Secretary-General of the International Bureau of the Permanent Court of Arbitration in The Hague to make a statement before the Sixth Committee when it discussed the United Nations Decade of International Law. He reminded the Committee that a similar request the previous year had been answered favourably. He informed the Committee that, with its consent, he intended to reply that although it was not the normal practice of the Sixth Committee to hear statements from organizations which had not obtained observer status with the General Assembly and were not members of the United Nations system, he was prepared to give the floor to the Secretary-General of the International Bureau during the debate on the Decade.

83. It was so decided.

The meeting rose at 6 p.m.

UNITED NATIONS
General Assembly
FORTY-SEVENTH SESSION
Official Records

SIXTH COMMITTEE
23rd meeting
held on
Thursday, 29 October 1992
at 3 p.m.
New York

SUMMARY RECORD OF THE 23rd MEETING

Chairman: Mr. ZARIF (Islamic Republic of Iran)

later: Mr. TOMKA (Czechoslovakia)
(Vice-Chairman)

CONTENTS

AGENDA ITEM 129: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION (continued)

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The meeting was called to order at 3.10 p.m.

AGENDA ITEM 129: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION (*continued*) (A/47/10)

1. Mr. FERRARI BRAVO (Italy) said that although there was no denying the links between the Draft Code of Crimes against the Peace and Security of Mankind and the possible establishment of an international criminal court, they should be the subject of different legal instruments; under current circumstances, the establishment of an international criminal court, to which he restricted his comments, was more urgent than the adoption of the draft Code, which once agreed upon should come under the jurisdiction of the court.

2. While his delegation concurred with the views expressed by the delegation of the United Kingdom on behalf of the European Community and its member States, he wished to add some complementary remarks on behalf of Italy.

3. The need to establish an international criminal jurisdiction had already been felt at the time of the League of Nations, although after the Nürnberg and Tokyo trials, it had seemed less urgent, perhaps because of the general feeling that the lesson of war had vaccinated mankind against a repetition of the atrocities of the Second World War. The Convention of 1948 on the Prevention and Punishment of the Crime of Genocide had not been completed by the establishment of a criminal jurisdiction. Subsequently, the long period of the so-called cold war had seen the emergence of new forms of criminal activity such as the hijacking of and attacks against civil aircraft or ships, which had given rise to widespread general concern and to the need for punishment. A series of conventions had been drawn up, based on the principle "try or extradite", whose success had contributed to expanding what was currently known as "international criminal law".

4. In addition to new scourges, such as drug trafficking, that demanded punishment at the international level, the world had witnessed a resurrection of criminal activities in the form of crimes of war or crimes against humanity, whose frequency required swift action.

5. Accordingly, many Governments, including his own, felt that it was time to take further steps towards effective punishment of international crimes by making serious efforts to bring their perpetrators before an impartial international jursidiction, which should be achieved by the finalization of the text of a convention establishing a universal criminal court. He stressed the universal nature of the court as although a partial, ad hoc solution might be useful in a special contingency, it could not sufficiently guarantee real justice. There was no denying the difficulties of the proposed endeavour, as the establishment of an international criminal court would necessarily impinge on State sovereignty, although some degree of encroachment was indispensable to ensure the basic rights of mankind.

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(Mr. Ferrari Bravo, Italy)

6. A light and flexible body should be established by treaty, for example by electing a small bureau entrusted with the task of constituting, each time the need arose, a tribunal composed of persons of recognized independence and impartiality who could serve as judges. The only requirement would be a list of persons designated by States parties to the convention establishing the court, from which the bureau would draw the appropriate names. He cited as a model the European court for conciliation and arbitration recently agreed upon, at the level of experts, by the States members of the Conference on Security and Cooperation in Europe.

7. The jurisdiction of the criminal court should be confined to private persons and should of course include State officials. Punishment of States themselves raised different issues and would probably be better addressed in a different context. The jurisdiction of the court ratione materiae should extend to all the universal conventions that constituted international criminal law, including the Geneva Conventions and Protocols. The court's jurisdiction should be binding, a view that might not be shared by the majority of delegations. However, he invited those opposed to a binding jurisdiction to reconsider and to bear in mind the threat to the credibility of the proposed system that too low a threshold would entail. The establishment of an international criminal court was a major innovation that could prove counter-productive in the long run, if public opinion did not clearly perceive a strong determination to combat international crime.

8. It was essential that accused persons should feel that the norms they might have violated concerned them directly, and the rules applicable should be contained in international legal instruments and also translated into national legal systems, at least as far as the definition of crime and the appropriate punishment was concerned. It also went without saying that accused persons should enjoy all the rights related to a fair trial, as recognized by the basic instruments of international law.

9. He concluded by expressing his confidence that the high professional level of the Commission would allow it to discharge its mandate in the most effective way.

10. Miss CHATOOR (Trinidad and Tobago), speaking on behalf of the States members of the Caribbean Community (CARICOM), said that the Caribbean Community supported the establishment of an international criminal jurisdiction and an international criminal court, which should have exclusive jurisdiction over the most serious international crimes. Although criminal trials of individuals had traditionally been before national courts, that was not the only workable mechanism, and an international criminal court could be a viable alternative to domestic criminal trials and extradition. The preference expressed by some States for an international court with concurrent jurisdiction could provide those States that had serious reservations about exclusive jurisdiction with a workable compromise, and the Commission should further examine the practical application of the concept of concurrent jurisdiction at its next session.

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(Miss Chatoor, Trinidad and Tobago)

11. Her delegation would not support a court which only had review jurisdiction, although, as it had stated the previous year, consideration could be given to the creation of a review mechanism within the court, whose determination would be referred to the plenary for a final decision. The establishment of a permanent court with its own registry and staff, which her delegation preferred, would enable the institution to formulate its particular jurisprudence and would render it less susceptible to possible manipulation.

12. Her delegation supported the suggestion made in paragraph 434 of the report that the court should be essentially a facility for States parties to its statute, and endorsed the view of the Working Group on an International Criminal Jurisdiction that the court's jurisdiction should not be binding upon States that became parties to its statute. Rather there should be a separate agreement whereby parties could decide whether the trial should be transmitted to the international court, determined in a domestic court of one State, or whether the accused should be extradited.

13. With regard to the structure and jurisdiction of the court, her delegation supported the proposal that the court should have its own statute in treaty form. In terms of composition, States parties to the court's statute could submit nominees of the highest integrity, with specific qualifications in the fields of international criminal law or international humanitarian law and the administration of justice, who would be selected to serve when a matter was brought before the court, a procedure which would reduce costs. However, in the long term her delegation envisaged a court with full-time judges whose structure could be similar to that of the International Court of Justice.

14. The court's competence should initially be restricted to those crimes of an international character defined in international conventions. When the draft Code of Crimes against the Peace and Security of Mankind came into force, the court's statute could be amended to include the crimes contained therein. Although events had led some delegations, including her own, to take the view that the draft Code and the court should be considered separate items, she observed that the draft Code could, as had been noted by the Commission in paragraph 463 of its report, be "one of the international instruments defining offences of an international character which would be subject to the competence of the court". For the draft Code to be a viable international legal instrument, there had to be some implementing apparatus, in that instance, an international court.

15. With regard to its administrative arrangements, the court should be part of the United Nations system so as to be able to benefit, in particular, from the Organization's expertise in administrative and budgetary procedures.

16. The court could operate, at least initially, with a very small staff who might rely on the facilities of the Registry of the International Court of Justice. However, her delegation did not support the proposal that the Office

(Miss Chatoor, Trinidad and Tobago)

of the United Nations Legal Counsel could perform registry functions, although its officers could serve as advisers. Wherever possible, the court should sit in the State in which the alleged offence had been committed or within the same region, although due consideration should be given to security arrangements and to the willingness of the victim State to allow the trial to be held on its territory. In the future, it might be possible for the court to have a permanent home when its workload increased. Consideration could also be given to the court sitting from time to time in the territory of a State party.

17. An international criminal court would be much more effective than any other trial mechanism. Although a regional court could be useful in addressing a problem particular to a region, international criminals such as drug traffickers, terrorists or traffickers in arms did not confine their activities to any one region and it was doubtful whether an institution less than a court could gain widespread respect and support.

18. Regarding applicable law, each State party to the court's statute should ensure that its domestic legislation gave effect to the relevant international conventions, thereby enabling the court to refer to national as well as international criminal law during its deliberations. Consideration could also be given to the sources stated in Article 38 of the Statute of the International Court of Justice. The court's initial rules of procedure could be annexed to the statute and supplementary rules added as practice developed. States' domestic rules of procedure could also serve as a guide, and the Commission might also wish to examine the differences between and the similarities in State practice.

19. Concerning the matter of penalties, she said that consideration could be given to the application of the national practice of the victim State or States or of principles common to all nations. Her delegation also believed that the accused individual should be present during his trial.

20. In conformity with its preference for a permanent court, her delegation supported the establishment of an independent standing prosecutorial organ whose expertise would be available to small States. The prosecutor would have functions similar to those of a domestic prosecutor, and the department in question would investigate, collect and produce all the necessary evidence and prosecute at trials.

21. Her delegation supported the Working Group's recommendation that transfer to the court should not be regarded as extradition. As the monitoring and implementation of sentences might vary, their administration should be subject to the supervision of the court and the Commission should give further consideration to the development of a workable provision. The question of the place where sentence of imprisonment would be served should be considered in further detail, as small States might hesitate to have the term of imprisonment served in their own prisons.

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(Miss Chatoor, Trinidad and Tobago)

22. Her delegation supported the proposal made by the Working Group for the handing over of the accused, pursuant to which a State which had accepted the jurisdiction of the court with respect to an offence was obliged to hand over an accused person to it at the request of another State party which had accepted the same obligation. In the case of multiple requests from States, including from States which had accepted the court's jurisdiction or from the court itself, the requested State should be able to choose which request to accept.

23. Recent international developments and public statements by world leaders and government representatives had underlined the usefulness of and given encouragement to the idea of an international criminal court. The Commission had once again shown its willingness to continue to work for the establishment of an international criminal court, whose potential could only be realized through international cooperation, and which would meet the urgent need to bring to justice the perpetrators of the daily breaches of international humanitarian law and the violence associated with transnational criminal activities. The time was ripe for an international court to be established, and it was vital that the opportunity did not slip by.

24. Mr. Tomka (Czechoslovakia), Vice-Chairman, took the Chair.

25. Mr. VOICU (Romania) noted with satisfaction that the proposal for the mechanism of an international criminal court, put forward before the Second World War by a Romanian lawyer and diplomat, Mr. V. V. Pella, had been included in the appendix to the report of the Working Group on an International Criminal Jurisdiction (A/47/10, annex). Mr. Pella had argued that crime and justice had different colours and meanings in different national jurisdictions and that a system of international justice was therefore impossible without an international judicial organ. In the absence of such an organ for the trial of crimes against the peace and security of mankind, there could be no serious codification of international penal law and the world would go on living in judicial anarchy under the threat of the use of force.

26. Consequently, one of the most urgent tasks for the international community was to establish a flexible system of international criminal justice. The Commission's current report clearly recognized the need to begin the drafting of a statute for such a system, which would provide a permanent and neutral mechanism for determining matters of individual criminal liability.

27. While Governments might be accorded more time to formulate specific opinions on the far-reaching propositions submitted by the Working Group, the General Assembly should at its current session renew the Commission's mandate to continue and complete its work on drafting the statute of an international criminal court. In fulfilling its mandate, the Commission should take into account the observations and suggestions formulated during the current debate. Interested States should have a further opportunity to provide more

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(Mr. Voicu, Romania)

detailed comments by early 1993. That could also be done in the replies requested by the Secretary-General on the draft Code of Crimes against the Peace and Security of Mankind. In its future work, the Commission should continue to use the valuable proposals formulated by non-governmental organizations, such as the Foundation for the Establishment of an International Criminal Court and the International Association of Penal Law, which had been very active in the field of international criminal law. His delegation also commended the initiative of Canada to convene at Vancouver early in 1993 an international meeting of experts in that field.

28. With regard to the substance of the draft statute, the Commission should follow the specific recommendations submitted on the subject in 1992. The court's jurisdiction should be limited to crimes of an international character, as defined in relevant international treaties in force, as well as in the draft Code of Crimes against the Peace and Security of Mankind. During the first phase of its operations, at least, such a court should exercise jurisdiction only over private persons, as distinct from States. The draft statute should also make clear that the future court must guarantee due process, independence and impartiality in its procedures.

29. The Commission's work on the draft statute was a significant contribution to the Decade of International Law. In the current post-cold war era, people everywhere had high expectations for a new world order in which peace was more than the absence of war and justice more than a dream. By providing a clear and specific mandate to the Commission to continue and complete its drafting of the statute of an international criminal court which would serve the rule of law in the world community of nations, the Committee would be assisting in the task of constructing that new international order.

30. Mrs. GOLAN (Israel) said that her generation had witnessed and had been a victim of the most barbaric international crime ever committed, namely, the genocide perpetrated by the Nazi regime. The Allied Powers had rightly established an ad hoc tribunal at Nürnberg after the Second World War to judge the individuals chiefly responsible for that and other crimes against humanity. To the extent that the Nürnberg Tribunal was recognized as the precursor of the proposed international court which would try such criminals, it must also be acknowledged that the Nürnberg trials had been held under circumstances radically different from those likely to prevail when the court was called upon to operate. A consensus had existed at the time among all the Members of the United Nations represented at Nürnberg as to the extreme criminality and bestiality of the acts attributed to the accused and the standards by which they must be judged. The accused had already been in the custody of the Allied Powers, and the question of how they should be handed over, and to whom, had thus not arisen; nor had the question of alternate venues arisen, for the judges had represented the victims, and the State of nationality of the accused, the Third Reich, had been unconditionally vanquished.

(Mrs. Golan, Israel)

31. In the contemporary world, however - and after more than 40 years of deliberation - there was no code of international crimes agreed upon by the international community as a whole. Indeed, the proposed list of crimes included some which paled beside the atrocities with which the Nazis had been charged.

32. Her delegation had already expressed its concern at some features of the draft Code of Crimes under which individuals could be charged and prosecuted, possibly before an international criminal court, and had advised the Commission to reconsider the scope of the offences to be included therein with a view to limiting it to the most serious crimes, those recognized by all as crimes against peace and humanity.

33. The desirability or feasibility of establishing an international criminal court and the elaboration of a code of crimes against the peace and security of mankind were inseparably linked, since in order for such a court to enlist the full support of the world community, its jurisdiction must be based on universally accepted principles. It was difficult to accept that States would divest themselves of their national sovereignty in order to create a court which would compete with their own jurisdiction, unless the competence of such a court, being limited to the most heinous crimes, was beyond question.

34. As to the reference in the Working Group's report to situations where an international trial system might prove useful (A/47/10, para. 420), it was reasonable to expect that a State which was reluctant to try the accused persons, for the reasons stated in the report would be equally reluctant to hand them over to an international court.

35. Moreover, no person should be in jeopardy of being handed over to an international court merely on the basis of a State having filed an uninvestigated complaint against him with no proper extradition procedure or guarantee of his basic civil rights. There must be a mechanism to ensure that such a court would indeed serve international justice and would not be used by irresponsible States to further political ends.

36. A restrictive approach should be adopted on the question of the personal jurisdiction of the court so as not to undermine the national jurisdiction of the States concerned in criminal matters and to protect the rights of the accused.

37. Accordingly, the consent of the State in whose territory the crime had been committed, the State of which the accused was a national, the State which had been the victim of the crime or whose nationals had been the victims of the crime and the State which had custody of the accused would be needed in order for the court to be able to exercise its jurisdiction. Furthermore, if it was decided that those States must be parties to the statute and must have accepted the court's jurisdiction over the offence in question, and if one or

more of that group of States did not meet that requirement, then the court should not be able to exercise its jurisdiction.

38. The right to institute proceedings should be limited to those States which had become party to the statute of the court.

39. With regard to bringing defendants before a court, the proposition that the handing over of an alleged perpetrator to the court was not an extradition presented a major problem in respect of the fundamental rights protected by extradition treaties. The Working Group's proposal that arrangements for transfer could be set out in an annex to the statute, which would be binding, *ipso facto*, on States parties to the statute, was unacceptable, as was the proposed list of grounds which could not be cited for denying transfer.

40. With regard to the law to be applied, while the court should, in appropriate cases, be allowed to apply national law, no provision was made for the role of the resolutions of international organizations, as they were not legislative bodies.

41. Lastly, the fundamental issue of ensuring due process of law had not been sufficiently considered in the report. A system of preliminary hearings in which the adequacy of the evidence against the accused would be tested and the accused heard, should be required before prosecution was initiated. In addition, it might be necessary to give the States concerned the right of appeal to the court, not only against the prosecutor's decision not to prosecute, but also against the decision to prosecute.

42. Mr. SCHARIOTH (Germany) said that the Working Group's report had spelled out very clearly why an international criminal court was urgently needed. Since 1945, abhorrent crimes against humanity had gone unpunished owing to insufficient prosecution at the national level and to the complete absence of an international trial mechanism. Where perpetrators of such crimes could be certain of impunity and where flagrant disregard of international law entailed no personal consequences for those responsible, the legal and binding character of norm themselves was called into question. In order to be effective therefore, international criminal law needed a trial mechanism capable of prosecuting its violators.

43. While the Working Group's report had revealed the multitude of technical and legal difficulties that must be overcome, there was a broad consensus that an international criminal court as outlined by the Commission was at least not impossible. Some delegations had expressed certain reservations about the timing and had indicated a preference for another round of written comments to be considered by the Commission, with the relevant decision being postponed yet another year. The Committee's debates, however, did not take place in a vacuum. Serious violations of humanitarian law were currently occurring and people everywhere, not only the victims of such deeds, were expecting a clear

(Mr. Scharioth, Germany)

signal that the international community was determined not to tolerate any longer the flouting of the most basic norms for the protection of international peace and security. The Commission itself, after several years of in-depth studies, had indicated that it was prepared to take up the issue immediately and to draft a treaty along the lines set out in its report. In those circumstances, no one would understand it if the Committee did not unequivocally recommend to the General Assembly that the Commission should continue its work as a matter of top priority. If some delegations felt that States should be given the opportunity to supply more detailed comments, States should be asked to do so by early 1993 so as to enable the Commission to take them into account during its session of that year.

44. His delegation welcomed the flexible and realistic approach adopted by the Working Group, whose members had clearly expressed themselves on a number of minimum requirements for the drafting of the statute. For the reasons set forth in the Working Group's Report, the international criminal mechanism should be conceived neither as an institution that merely observed proceedings at the national level nor as a review mechanism. What was needed was a court in the proper sense in order to fill the void that existed where no prosecution whatsoever took place at the national level.

45. He agreed with the view that if the principal reason for establishing an international court was insufficient enforcement of existing criminal norms at the national level, then it would suffice to set up an optional and concurrent international jurisdiction which would supplement national jurisdiction without superseding it. The Committee could not, however, overlook the fact that States would not be easily moved at the current time to totally cede to an international court their basic jurisdiction over crimes committed on their territory or against their own population.

46. Since it was difficult to foresee whether and to what extent a new international court in the field of criminal law would be capable of exercising its functions, his Government endorsed the Working Group's suggestion that the court should not be a full-time standing body. His delegation fully shared the view that the law to be applied by the court should be derived only from international treaties in force and must be specified in the statute of the court. In accordance with the principle nullum crimen sine lege, those norms had to exist in the form of rules directly obligating the individual. The statute should be very precise on that point.

47. The guarantee of certainty and clarity of the law, particularly in the field of penal law, also applied to the penalties to be imposed. The statute needed provisions dealing with the question of penalties for those cases where the applicable substantive law did not specify the penalties. His delegation felt that the death penalty should be ruled out. Questions such as extenuating circumstances or defences also had to be addressed in the statute, which should contain sufficiently precise rules for cases where the draft Code of Crimes did not apply.

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(Mr. Scharioth, Germany)

48. The statute should not be linked too closely with the draft Code of Crimes. His delegation agreed that the material jurisdiction of the court should not be limited to the draft Code, pending its entry into force, but should also cover other norms of international criminal law. If the entry into force of the draft Code was delayed for an extended period owing to lack of ratifications, the international criminal court should be able to function independently.

49. His delegation also agreed that a State should be able to become a party to the statute of the court without necessarily becoming a party to the Code. Too close a link between the statute and the Code could constitute an obstacle to States wishing to become parties to the statute and could thus diminish the chances of an international criminal court attaining universal membership.

50. Ms. LITTLE (Jamaica) said that her delegation fully supported the statement made by the representative of Trinidad and Tobago on behalf of the member States of CARICOM. It was also broadly in support of the approach taken by the Working Group.

51. Since the proposal for the establishment of an international criminal court had come from a small State, Trinidad and Tobago, it was gratifying that the Working Group was sensitive to the concerns of small States and made special mention of cases where the criminal justice system of a small State was overwhelmed by the magnitude of a particular offence. The Working Group also referred to the problems small States would face if the State in which the offence was committed was invariably chosen as the venue of the court, and if sentences of imprisonment were served in the prisons of the complaining State. At the same time, small States realized that all relevant considerations and interests would have to be reflected in the establishment of an international criminal court.

52. Her delegation generally supported the seven basic propositions set out in paragraph 396 of the Working Group's report. However, it believed that the statute should include a provision prohibiting the court from prosecuting a person of whom a State party had gained custody by recourse to measures which, in the opinion of the court, violated international law. Such a provision was warranted by current trends in world affairs, and would serve to buttress the territorial integrity of small States. A formulation which merely called upon a State to hand over to the court a person within its jurisdiction would be too wide, since extraterritorial jurisdictional claims might lead to incursions by some States into the territory of others. The statute should confine the obligation to hand over persons to the court to States in whose territory the offender was present; such a provision would be consistent with the approach taken in a number of international conventions establishing particular crimes. In its report the Working Group referred to cases where a State party to the court's statute had lawful custody of an alleged offender (A/47/10, para. 456); she took the reference to "lawful custody" to mean that the court would be entitled to inquire into the circumstances under which that

(Ms. Little, Jamaica)

State had gained custody of the offender and, if it was determined that the custody was not lawful, the court would not prosecute him, because the absence of lawful custody would mean that the State party had no right to hand over the offender to the court.

53. Under the typical *aut dedere aut punire* convention, a State in whose territory an alleged offender was found was obliged, if it did not extradite him, to submit the case to its competent authorities for prosecution. All States parties to such a convention which had established jurisdiction over the offence in the manner specified in the convention would be entitled to request the extradition of the offender. If all the States parties to such a convention were also parties to the court's statute, then article 30, paragraph 3, of the Vienna Convention on the Law of Treaties would apply, and jurisdiction could be ceded to the court by the State in whose territory the offender was found. If only the States parties which had the right to request extradition, as distinct from all States parties to the Convention, were parties to the statute, then article 30, paragraph 1, of the Vienna Convention would apply, and the court's statute would prevail among those States; but, in the case of States that were parties to the convention but not to the court's statute, the convention would prevail. In that latter situation a State party to the convention but not to the court's statute would be entitled to insist on extradition of the offender.

54. It seemed therefore that "ceded jurisdiction", as discussed in the Working Group's report (A/47/10, para. 456) would work only between States parties to both the *aut dedere aut punire* convention and the court's statute; States parties to the convention but not to the statute would always be able to insist on extradition of an offender and thus prevent his transfer to the court. However, if a State in the latter category did not object to the transfer of the offender to the court, prosecution by the court should be able to proceed. Further consideration needed to be given to the ramifications of that situation, which could effectively render the court non-functional. If an international criminal court was established, States parties to *aut dedere aut punire* conventions should be specifically targeted in an effort to encourage them to become parties to the court's statute.

55. The Working Group envisaged that the jurisdiction of the court would be concurrent with that of national courts, but offered no explanation as to the meaning of the term "concurrent jurisdiction". If the term meant that the court's statute would provide for, or accommodate, jurisdiction by national courts in respect of offences over which the court also had jurisdiction, confusion would result. It was clear that States parties to *aut dedere aut punire* conventions would have jurisdiction over certain offences in respect of which the court had jurisdiction; such jurisdiction was the inevitable result of the application of the law of treaties, and in particular the rules governing the relationship between successive treaties dealing with the same subject-matter. A clear explanation was needed.

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(Ms. Little, Jamaica)

56. Her delegation had some difficulty with the suggestion in paragraph 446 of the report that the State party to the statute would be able to accept the jurisdiction of the court ad hoc in relation to a particular offence. It felt that acceptance should be in advance and for a specific offence in a treaty to which the State was a party. Ad hoc ex post facto acceptance in relation to a particular offence could be seen as provocative and could sour the relations between the accepting States and other States, especially the State of which the offender was a national.

57. In addition to the arguments against a court outlined in paragraphs 425 to 428 of the report, there was another factor which might inhibit acceptance by States of the court's statute, and which might even cause States to entertain reservations about their acceptance of aut dedere aut punire conventions, which was that the right of States parties to such conventions to prosecute offenders in their courts if they did not extradite them could be overridden by a contrary obligation arising under Article 103 of the Charter of the United Nations. That situation had been confirmed by the International Court of Justice in its recent ruling on questions of interpretation and application of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation arising from the aerial incident at Lockerbie. Thus, prospective States parties to the treaty establishing the statute of an international criminal court might well wonder whether there was any point in accepting the court's jurisdiction in respect of a particular offence, if a decision could be taken by the Security Council to require the surrender of the alleged offender to a particular State. The system of the paramountcy of the Charter obligation under Article 103 imposed a special burden on the Security Council to act with the utmost care in the discharge of its responsibilities when it considered taking decisions which conflicted with the rights and obligations of States under multilateral and other treaties; otherwise States would lose respect for, and faith in, the consensual regimes they had established under international conventions.

58. Her delegation believed that the General Assembly should give specific instructions to the Commission to draft the statute for an international criminal court; delegations would then be in a better position to offer definitive news on the establishment of such a court.

59. Mr. MONTES de OCA (Mexico) said that his delegation noted with satisfaction that the Commission had fully discharged the mandate of the General Assembly, which had been to analyse the question of the establishment of an international criminal court or other international criminal trial mechanism. Among the merits of the proposal which was before the members of the Committee was its high degree of flexibility, the confinement of the court's jurisdiction to crimes recognized as such under existing international conventions, the optional basis on which the court's jurisdiction was to be established and the guarantee of independence and impartiality in its procedures.

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(Mr. Montes de Oca, Mexico)

60. His delegation shared the view that the machinery for international judicial assistance was inadequate for the prosecution of crimes of an international character. Nevertheless, before the Commission could be given a mandate to proceed with the preparation of a draft statute for an international criminal jurisdction, the views of Governments should be sought; his delegation therefore proposed that a deadline should be established for the transmittal of such views.

61. Mr. HAMAI (Algeria) said that the term of office of the Commission's members coincided with the mid-point of the United Nations Decade of International Law. That offered an additional opportunity to prepare for what should be the crowning achievement of the Decade, namely, the convening of a third international peace conference which could make a significant contribution to the implementation of the Declaration on the Right of Peoples to Peace, adopted by the General Assembly in its resolution 39/11, and to the establishment of truly democratic, equitable and peaceful international relations.

62. His delegation reaffirmed its support in principle for the establishment of an international criminal court, the existence of which was closely linked to the elaboration of a code of crimes against the peace and security of mankind. Indeed, there could be no such code unless there was an international criminal jurisdiction to administer it.

63. Some delegations had expressed reservations concerning the desirability or feasibility of establishing such a court; for that reason, Algeria noted with satisfaction that the Commission had adopted a realistic approach in proposing to prepare a draft statute in the form of a multilateral treaty. That approach was based on the primary characteristic of international law, namely, the freedom of sovereign States to conclude international agreements. Such a formula would ensure the broadest possible support for the future court. It should be noted, however, that the court's statute and the draft Code of Crimes should not constitute separate instruments.

64. His delegation did not agree that in the first phase of its operations, the court should be an ad hoc body, the composition of which would be determined in each specific case, and which would be called into operation as required. Criminal law had to be strict, otherwise, the credibility and effectiveness of the draft statute could not be ensured.

65. With regard to the court's jurisdiction, a number of alternatives had been proposed, ranging from binding and exclusive jurisdiction to optional and concurrent jurisdiction, or some combination of the alternatives. In his delegation's view, a choice among those alternatives could be made only in the light of the objectives sought. The Commission's mandate clearly indicated the link between the draft Code of Crimes and an international criminal court; logically, therefore, the court's jurisdiction could extend only to the crimes specified in the draft Code, could only be compulsory and exclusive, and should cover cases heard both in the first instance and on appeal.

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(Mr. Hamai, Algeria)

66. In calling for the preparation of a draft Code of Crimes, the General Assembly had intended to sanction crimes which were serious, fundamental and genuinely prejudicial to the peace and security of mankind. It was important, therefore, not to overwhelm the future court by giving it jurisdiction over offences which, however serious, were not crimes against humanity. The purposes and principles of the Charter of the United Nations should be the defining criteria in that regard.

67. Concerning the question of the relationship between an international criminal jurisdiction and the Security Council, as referred to in paragraphs 81 to 87 of the report, his delegation believed that the future court and the Council should be separate and independent of one another. While the Council was a political body acting in accordance with the powers attributed to it under the Charter, the future court would be a judicial organ to which political considerations did not apply, and which would be motivated solely by the impartial administration of justice.

The meeting rose at 5.05 p.m.

UNITED NATIONS
General Assembly
FORTY-SEVENTH SESSION
Official Records

SIXTH COMMITTEE
24th meeting
held on
Friday, 30 October 1992
at 10 a.m.
New York

SUMMARY RECORD OF THE 24th MEETING

Chairman: Mr. ZARIF (Islamic Republic of Iran)

CONTENTS

AGENDA ITEM 129: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION (*continued*)

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The meeting was called to order at 10.10 a.m.

AGENDA ITEM 129: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION (*continued*) (A/47/10, A/47/95, A/47/441-S/24559; A/CN.4/442)

1. Mr. FSADNI (Malta) said that his delegation reiterated its support for the establishment of an international criminal court, and stressed the growing need for such a body, bearing in mind the widespread violations of international humanitarian law in the former Yugoslavia, which had shocked international public opinion. The international community and, in particular, the Sixth Committee and the International Law Commission must find lasting solutions to admittedly complex issues.

2. Malta accepted the conclusions set forth in subparagraphs (a) and (b) of paragraph 104 of the report, to the effect that the Commission had concluded the task of analysis of the question, and that a structure along the lines of that suggested by the Working Group could be a workable system. His delegation also supported the granting of a new mandate to the Commission to draft the statute of the proposed international criminal court.

3. He wished, however, to place on record his views on some of the more important issues. In the first place, he agreed that the international criminal court should be established by a statute in the form of a treaty agreed to by States parties, but he had difficulties with the proposal that the court should not be a full-time body but should be constituted on each occasion that it was required to act. In his view, the consequential weakening of the court caused by the lack of continuity and its diminished independence and authority might undermine its continued existence.

4. With regard to the court's jurisdiction *ratione materiae*, Malta favoured a flexible regime with States parties to the court's statute being given the option of specifying which international crimes they would accept as falling under the jurisdiction of the court. That raised the issue of whether the court could exercise jurisdiction in relation to crimes under customary international law which had not been incorporated in or defined by treaties in force. His delegation believed that the principle of *nullum crimen sine lege* should prevail, it being established that the court could exercise its jurisdiction only over crimes defined in an acceptably precise manner in treaties.

5. On the issue of the linkage between the proposed Code of Crimes against the Peace and Security of Mankind and the establishment of an international criminal court, his delegation believed that such a linkage could prove detrimental at the early stage, and therefore agreed with the conclusion arrived at in paragraph 463 of the report, to the effect that the statute of the court and the Code should be separate instruments, and that a State should be able to become a party to the statute without thereby becoming a party to the Code.

(Mr. Fsadni, Malta)

6. On the issue of the jurisdiction ratione personae of the court, the Commission appeared to be confident that a general solution that would satisfy the different jurisdictional systems in existence without rendering the court's jurisdiction virtually meaningless was within grasp. The Commission should explore that solution further, as that could well mean the elimination of the single most important obstacle to the establishment of the court.

7. Although it would be premature to comment on administrative arrangements for the court, Malta would prefer for it to be within the United Nations system, inasmuch as that would strengthen its universal character and allow for the possibility of utilizing structures that already existed in the Organization.

8. The Working Group had dealt in some detail with the issues of applicable law, penalties and due process, as well as the prosecution aspects of the subject. Those issues of a more technical nature should be examined in further detail, and his delegation endorsed the Working Group's assumption that the court should not be empowered to try an accused person in absentia; the bringing of the defendant before the court was a question of paramount importance.

9. Finally, his delegation felt it was important to comment on the grave situation obtaining in the former Yugoslavia. Malta welcomed, as an initial step, Security Council resolution 780 (1992) on the establishment of an impartial Commission of Experts to examine evidence of grave violations of international humanitarian law committed in that territory, and supported the suggestion made by the representative of Austria that an ad hoc criminal jurisdiction should be created to deal with the alleged war crimes and crimes against humanity committed in the former Yugoslavia.

10. Mr. DE SARAM (Sri Lanka) said that the questions whether an international criminal court should be established and, if so, what its form should be, were not easy to answer, and gave rise to a number of considerations that needed to be examined. The problems were not of a strictly legal or technical nature, but rather of an international political character, and could be summarized in certain beliefs and uncertainties. In the first place, there was the belief that the establishment of a network of bilateral or multilateral extradition arrangements ("try or extradite" clause) between States could achieve the same purpose as an international criminal court. In the second place, there was uncertainty as to how the establishment of an international criminal court would accord with sovereignty or matters essentially within domestic jurisdiction. There was also concern as to what the costs of establishing the court would be, and who would bear such costs. Lastly, it was believed that an international criminal court should be a standing body with permanent judges, who could contribute in a continuing and consistent manner to international criminal-law doctrine and jurisprudence. There was some justification for all of those considerations.

(Mr. de Saram, Sri Lanka)

11. With respect to the first question, it had been demonstrated that the existing extradition system did not work very well, and that it was a source of serious jurisdictional conflicts between States, which were disruptive to inter-State relations. In that regard, the usefulness of an international criminal court was obvious, inasmuch as it would also serve as a deterrent to international crime and would provide the important logistical base which a trial of an alleged international criminal would necessitate, and which the economic and social structures and criminal justice systems of many countries would not be in a position to supply.

12. There were, as well, reasons of a more abstract nature for advocating the establishment of an international criminal court. In the first place, there had been an increased "global consciousness" and a great sense of oneness amongst the peoples of the world, as evidenced at the United Nations Conference on Environment and Development, held in Brazil. To that must be added the end of the cold war, which had made it possible to overcome distrust and suspicion, and the fact that the world community had begun to look more and more to the United Nations for solutions to international problems.

13. The question whether there should be an international criminal court had been asked when the Convention on the Prevention and Punishment of the Crime of Genocide had been adopted in 1948, and again when the International Convention on the Suppression and Punishment of the Crime of Apartheid had been adopted in 1973. The question had been raised once again in 1990, when the General Assembly had felt it timely that the International Law Commission should consider it. The Commission had completed the first stage of its work, and it was now up to the General Assembly to decide what course the Commission should follow next.

14. In accordance with the clear recommendation contained in the Commission's report, the international criminal court should be constituted by treaty and should be convened only as required, by way of a procedure to be prescribed. The court would have a precise jurisdictional coverage, and each State would be able to introduce "optional" elements in the court's statute. Finally, the court would not have exclusive competence, and, when convened, would function concurrently with the present bilateral and multilateral "try or extradite" treaty-network system.

15. The proposal was reasonable and realistic, and took into account the hopes and demands of the world community, the inadequacies of the existing system established in bilateral or multilateral treaties, the sensitiveness of States on matters relating to their sovereignty and domestic jurisdiction, the severe financial constraints that affected all States, and the importance of doing everything possible to ensure that there was general consensus in the United Nations, whatever might be the result of the deliberations on the subject.

16. Moreover, according to the Commission's proposal, the Sixth Committee should not for the time being commit Governments to acceptance of an international criminal court, but should merely recommend to the Commission that it should continue its work on the lines proposed, and submit to the General Assembly in 1993 a fuller report on the matter.

17. Finally, it was also very important that Governments should be consulted, at every possible stage, and not only departments or ministries of foreign affairs, but also national authorities in the fields of criminal law and criminal justice administration. It would be important, however, to approach Governments for their views at the right time, and not too early, since it was possible that premature consultation would not really serve a useful purpose or might even be counter-productive.

18. Mrs. FLORES (Uruguay) said that the fundamental issue posed by chapter II of the Commission's report was whether the Commission should begin to prepare the draft statute of the international criminal court, and if so, whether it should continue its work on the basis of the propositions contained in paragraph 396 of the report. The issue was not a new one, although recent developments on the international scene had highlighted its renewed relevance. Accordingly, her delegation was in favour of the Commission being given a fresh mandate to draft such a statute, as a matter of priority.

19. As far as the court's jurisdiction was concerned, the report restricted it to individuals. Such a restriction could prove a valuable starting-point, but did not take into account the situation envisaged in article 19 of the draft articles on State responsibility, which distinguished between international crimes and international delicts and was one of the most significant steps forward in the codification of the juridical regime of State responsibility. In that draft, the Commission established that in addition to making reparation, the State that had committed the international crime could be sanctioned.

20. Her delegation shared the view that the subject-matter jurisdiction of the court should be limited to crimes of an international character defined in international treaties in force, including the draft Code of Crimes against the Peace and Security of Mankind.

21. Regarding the link between the court and the draft Code of Crimes, Uruguay believed that they were two separate projects, and accordingly that a State could be a party to the court's statute without thereby becoming a party to the Code, and vice versa. It also favoured a system of compulsory and exclusive jurisdiction which offered the possibility that not only States, but also individuals, could have access to the court, and which included the right of appeal, which was a fundamental guarantee in any criminal procedure.

(Mrs. Flores, Uruguay)

22. In terms of structure, the court should be a permanent body on account of the importance and number of cases that could be set before its jurisdiction. Many aspects of the issue still had to be considered. To do so, her delegation suggested progressing step by step, perhaps by means of a working group that would set itself short- and medium-term targets.

23. Mr. CASTILLO (Venezuela) said, regarding the establishment of an international criminal court, that the Commission had completed its technical analysis of the issue and that there was need for it to be granted a special mandate to prepare a draft statute and the law applicable under the international criminal jurisdiction.

24. His delegation had consistently expressed its support for the establishment of an international criminal court to try crimes of an international character. That position, which was justified by recent developments in the international sphere, had been reasserted by the President of Venezuela at the Summit Meeting of the Security Council, held on 31 January 1992.

25. In practice, the international jurisdiction would not be able to base itself on the existence of alleged partiality in national courts. It was rather a question of principle: the international community required a competent body to try crimes that affected it. Naturally, the question raised complex and difficult issues to which the court's statute should provide solutions. There would be no justification for establishing of legal mechanisms such as observers at national judicial trials, ad hoc courts to hear specific cases or the advisory opinions of the International Court of Justice.

26. With regard to the court's structure, Venezuela suggested that it should be full-time and that careful attention should be paid to its possible links with the International Court of Justice, in order to determine whether the court should operate as a chamber of that Court or independently. The jurisdiction of the court should be compulsory in respect of serious international crimes, and when States became parties to its statute, they should undertake to accept its jurisdiction. In his delegation's view, the jurisdiction of the court should also be exclusive, although it would be acceptable if it were restricted to specific crimes such as genocide, aggression, intervention, colonialism, serious human rights violations, apartheid, illicit international trafficking in narcotics, hijacking of aircraft, and kidnapping of diplomats or other internationally protected persons.

27. The subject-matter jurisdiction of the court should extend to crimes of an international character defined in international treaties in force and to those defined in new instruments such as the Code of Crimes against the Peace and Security of Mankind. The right to bring charges, file complaints or make appeals to the court should be exclusively limited to States, provided they

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were parties to the statute and involved in the case. The establishment of the position of prosecutor for that purpose did not seem advisable. Nor did it seem advisable to include in the Statute a provision analagous to Article 35 of the Statute of the International Court of Justice.

28. The rights of the accused and the trial procedure should be regulated by the court's statute. In that respect, it would be inopportune to follow the wording of Article 38 of the Statute of the International Court of Justice, which applied to different cases. The proposed court should be competent not only to try the accused, but also to rule on civil liability. A relevant precedent was article 63 of the American Convention on Human Rights regarding the powers of the Inter-American Court of Human Rights.

29. The statute should also make the necessary distinction between handing over an accused to the court and extradition, which were different matters. His delegation considered that the "double hearing" principle, as set out in article 14, paragraph 5, of the International Covenant on Civil and Political Rights, would be difficult to implement in international procedures and jurisdictions. The statute should contain provisions that were sufficient to guarantee the rights of the accused and an objective procedure, in order to ensure that the court's judgements were reliable and to avoid their being reviewed by other jurisdictions.

30. To conclude, his delegation proposed that the Commission should be given the necessary mandate to begin to prepare the statute of the court, which in its view, should be in the form of an international treaty.

31. Mr. VARGAS-CARREÑO (Chile) said that the question of the establishment of an international criminal court should be considered separately from the issue of the Code of Crimes against the Peace and Security of Mankind, despite the clear link between them. That approach could help further to develop international criminal law and achieve broader participation by States in each of the projects.

32. His delegation did not share the view that extending universal jurisdiction to national courts and international cooperation in respect of extradition were not the most suitable mechanisms for combating international crime. In certain Latin American countries at least, there had recently been fundamental changes to previous practice. The national courts had begun to implement as national law, in trying serious human rights violations, international instruments such as the International Covenant on Civil and Political Rights and the American Convention on Human Rights. Furthermore, the practice of handing over known foreign criminals by means of administrative expulsion had developed and new bilateral and multilateral treaties on extradition had been drawn up. His delegation approved of the inclusion in the Code of a fundamental norm stipulating the obligation of States to try or extradite those responsible for crimes against the peace and security of mankind.

(Mr. Vargas-Carreño, Chile)

33. In principle, Chile had no objection to the establishment of an international criminal jurisdiction, as there were a number of arguments in favour of gradually establishing an international criminal court. However, as a rule, the jurisdiction of the international court should be subsidiary to that of the national courts. In practice, the international court should merely be a means made available to States parties to its statute whereby they could guarantee justice and ensure that specific serious crimes did not remain unpunished.

34. The arduous and complex issues posed by the question had to be addressed with caution, flexibility and a sense of practicality. Regarding the court's structure, it should not for the time being that of be a permanent full-time body, but a machinery that would permit the court to meet on each occasion that it was required to act. The composition of the court would be decided in each specific case on the basis of objective criteria that would ensure the impartiality of its members.

35. With regard to the court's jurisdiction, his delegation thought that it should be compulsory in the case of crimes of extreme gravity of which humanity as a whole could be considered the victim, such as genocide. In the case of other crimes, which, however serious, were not of such magnitude, its jurisdiction could be optional and accepted where appropriate by the State concerned.

36. With regard to the relationship between the international criminal court and national courts, his Government stressed that the international jurisdiction must be subsidiary, which meant that no State that wished to investigate and punish a crime against the peace and security of mankind must be denied an opportunity to exercise its jurisdiction. The only case in which the international court could have sole and exclusive jurisdiction was where a State could not try the alleged author of a crime in respect of which the court had compulsory jurisdiction, such as genocide. In no circumstances could the international court exercise jurisdiction as a court of appeal or court of second instance in respect of decisions reached by a national court.

37. The Commission should study the possibility of the international court exercising advisory jurisdiction at the request of the States parties to its statute in order to assist national courts in properly applying and interpreting the international instruments that defined crimes against peace and security that were within their cognizance. In that regard the advisory powers of the International Court of Justice and of the Inter-American Court of Human Rights had been extremely positive.

38. With regard to the applicable law, the court should take cognizance only of offences defined in international instruments, including the draft Code of Crimes against the Peace and Security of Mankind.

(Mr. Vargas-Carreño, Chile)

39. As to whether the court should take cognizance only of crimes committed by individuals or whether its jurisdiction should also extend to States, his delegation was in favour of the first alternative, since the trial of States would raise very serious difficulties and, in any event, other means were available under international law to punish unlawful conduct by States. As a counterpoint to the lack of jurisdiction of the international court in cases of wrongful acts by States, the roles of the Security Council and the International Court of Justice must be strengthened, as must international machinery to protect human rights.

40. On the subject of State responsibility, it was still not apparent when States might reach agreement. Nevertheless, the absence of ideological confrontation as a result of the ending of the cold war and the increased opportunities in the current state of international relations to seek and achieve consensus offered favourable circumstances which must be taken advantage by to advancing the topic as quickly as possible as a priority in the work of the Commission in the years ahead.

41. Referring to the instrumental consequences of an internationally wrongful act, namely the question of countermeasures, he said that the question had virtually no similarity with the regime of State responsibility recognized by national legal orders. Further, the fact that no adequate international framework existed under current international law made it difficult to determine any elements for the regulation of the conduct of States.

42. Further, while there was a wealth of inter-State practice, the elements of lex lata were not by themselves sufficient for codification and they would need to be complemented by a progressive development of the question taking into account current international realities, different legal systems and the need to devise formulas that would lead to consensus solutions.

43. As indicated in the Commission's report, the basic requisite for legitimate recourse to a countermeasure was the commission of an internationally wrongful act that infringed the right of the State in question. In the view of his Government it was not enough for the allegedly injured State to believe in good faith that an internationally wrongful act had been committed against it, so that a State taking countermeasures on the basis of such an assumption must assume responsibility for its conduct and must itself accept international responsibility if it was concluded that no right had been violated. The principal objective of countermeasures was to bring about the cessation of unlawful conduct, compensate for injury caused or ensure that the act would not be repeated. On the other hand, its criminal role was questionable, given which his Government did not think it appropriate for the Commission's draft to embrace a punitive function.

44. He stressed that countermeasures could not be taken automatically and must, in principle, be preceded by some form of protest, notification, demand or warning. Further, he fully supported the proposal that the injured State

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(Mr. Vargas-Carreño, Chile)

should not be able to take any countermeasures without having previously exhausted all the procedures for an amicable settlement available under general international law, the Charter of the United Nations or any other dispute settlement instrument to which the State was party, and without having communicated its intention in a timely and proper manner. Of course, that condition could not apply if the State which had committed the internationally wrongful act did not cooperate in good faith in the choice and implementation of the peaceful settlement procedures.

45. His Government had serious doubts as to the advisability of including provisions relating to interim measures of protection, and, in particular, the express authorization of such measures before initiating a peaceful settlement procedure or during the course of such a procedure. Even though in some specific circumstances it might be legitimate and in accordance with international law, to include provisions relating to interim measures of protection would give rise to more difficulties then advantages.

46. He concurred in the prevailing view that the application of countermeasures should be proportional, taking into account not only the quantitative but also the qualitative aspects of the injury caused. In his view, countermeasures could be adopted only with due respect for the fundamental norms of international law, so that the injured State must refrain from the use of countermeasures involving the threat or use of force or any conduct at variance with the norms of international law for the protection of human rights that would occasion injury to the normal discharge of diplomacy or that would contravene a norm of jus cogens, or where the conduct involved an obligation with regard to any State other than that which had committed the internationally wrongful act.

47. With respect to the provision in the draft approved by the Commission in first reading by which the legal consequences of an internationally wrongful act of a State would be subject to the provisions and procedures of the United Nations Charter relating to the maintenance of international peace and security, he had serious doubts as to the advisability of including such a norm, which raised issues which went beyond that of the international responsibility of the State and which, rather, related to the settlement of disputes, the distinction between legal and political disputes and the competence of the Security Council and its relationship with other organs of the United Nations, in particular the International Court of Justice. The Commission should carefully examine the proposal that the legal consequences of an internationally wrongful act should be subject to Chapter VII of the United Nations Charter.

48. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, he said that it was a relatively new topic within which the elements of lex lata were not sufficiently developed and there was a need to give particular priority to the

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further development of international law in protection of the environment. In general, his delegation agreed with the Commission's report in that area.

49. With regard to other Commission decisions and conclusions, he welcomed the appointment of Mr. Rosenstock as Special Rapporteur on the law of the non-navigational uses of international watercourses and accepted the Commission's decision not to continue consideration of the topic of relations between States and international organizations during the terms of its present members given that the majority were of that view. Nevertheless, he hoped that the Commission would shortly decide to consider the question of the legal status, prerogatives and immunities of international civil servants, since the application by analogy of the Vienna Convention on Diplomatic Relations had created difficulties and had led to the commission of legal errors by Ministries of Foreign Affairs which could have been avoided had specific norms on the matter existed.

50. Lastly, his Government wished to encourage the Commission to continue two important activities which it had so far pursued with great efficiency, namely, cooperation with regional legal organizations, in particular, the European Committee on Legal Cooperation, the Asian-African Legal Consultative Committee and the Inter-American Juridical Committee, and the organization of the international law seminar intended for students with qualifications in international law and young instructors or officials of Ministries of Foreign Affairs, in connection with which he hoped that the number of fellowships could be increased.

51. **Mr. BERMAN** (United Kingdom) said that his delegation had already, in its capacity as President of the European Community, described the general approach of the Community and its member States to the question of the establishment of an international criminal court; he wished to add some comments on behalf of the United Kingdom.

52. Throughout the contemporary era there had been, and there continued to be, serious violations of rules for which, under international law, the perpetrators bore criminal responsibility; however, such perpetrators had seldom been called to account by the legal process. Efforts had been made in the Sixth Committee and other bodies to define offences under international law and to establish the obligation to punish them. The purpose of such international efforts was not punishment alone, but deterrence. His delegation wished to explore the possibility of finding practical solutions. It was to be hoped that that was exactly what the Commission proposed to do under the new mandate which it sought and which his delegation believed it should be given. The Chairman of the Commission had rightly pointed out that States should not ask the Commission to embark on the elaboration of a draft statute without first agreeing that the task was a worthwhile one. His delegation was prepared to provide such assurances.

(Mr. Berman, United Kingdom)

53. At the current, preliminary stage, it was possible to identify some things which were not being done. No one was seeking to eliminate national jurisdiction, but to complement it; no one was seeking to impose criminal responsibility where none had previously existed; and no one was proposing that accused persons should be tried in absentia. Those points helped to define the framework within which the Commission should proceed; the Commission's attention should be focused on issues which would need to be resolved and, in particular, on the following three areas: prosecution, evidence and punishment. To begin with evidence, there could be no question of successful prosecutions without sufficient evidence; indeed, evidence was essential. The issues with regard to evidence went beyond relatively straightforward matters, like the collection of evidence; they included the preservation, admissibility and relevance of evidence, the burden of proof, identification evidence, corroboration, expert witnesses, the right to silence, the right to confront the accuser, and so on. It was difficult to imagine how an international court could function without applying a unified set of rules to all cases.

54. The question of prosecution went beyond the issue of the possible establishment of an international Prosecutor's Office. It included such matters as ethics, the Prosecutor's duties towards the court and the defence, the Prosecutor's discretionary powers and the basis for deciding whether a charge should be maintained or dropped. The norms of criminal prosecutions varied widely from one legal system to another and should, accordingly, be specifically regulated.

55. With regard to punishment, his delegation wondered which State would bear the burden of implementing a sentence, how that would be decided in each case and whether the assumption could be made that issues concerning confidence and partiality, which formed the underlying rationale for the establishment of an international court, would cease to apply at the level of punishment. It would also be necessary to deal with questions of punishment regimes, access, pardon, parole and the issue of the death penalty.

56. The United Kingdom had previously been hesitant to give consideration to the possibility of the establishment of an international criminal court except in the context of the implementation of a code of crimes. After having reviewed the arguments in the Working Group's report, his delegation agreed that the Commission's mandate should be to prepare a draft statute in the form of a treaty to which States could become parties without thereby becoming parties to an eventual code.

57. Mr. KRAICHITTI (Thailand) said that an international criminal court could be established by means of a statute in the form of a treaty as recommended by the Working Group, and could be formally incorporated into the United Nations structure, probably by means of a General Assembly resolution. The court should be part of the United Nations or should be brought into relationship with it; that was the only way to ensure a sufficient degree of international support for its establishment and operation.

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(Mr. Kraichitti, Thailand)

58. In view of its objective, which was to try individuals accused of committing international crimes, and not to settle disputes between States, the court should not be established on an ad hoc basis. It should not, however, be a full-time body, but a pre-existing mechanism which could be called into operation as required. Each State party to the statute could nominate a number of qualified persons to act as judges when the need arose.

59. The court should not have compulsory jurisdiction. If a State became a party to the court's statute, that would not automatically imply its acceptance of the court's jurisdiction over particular offences. States parties to the statute could accept the court's jurisdiction in relation to a particular offence, or in advance, for a specified category of offences. The court's statute and the draft Code of Crimes should constitute separate instruments.

60. A State should be able to become a party to the statute while remaining free to confer jurisdiction on the court with regard to certain crimes defined in the draft Code of Crimes or other international conventions. A State which accepted the court's jurisdiction should be required to hand over accused persons to the court at the request of another State which had accepted the same obligation. In becoming parties to the statute, States should accept certain administrative obligations relating to the court's operating expenses, the nomination of its judges and the custody of accused persons.

61. The court's jurisdiction should be limited to crimes of an international character as specified in existing international treaties, including the draft Code of Crimes against the Peace and Security of Mankind. The court should exercise jurisdiction only over the most serious offences, such as war crimes, genocide, hostage-taking, the hijacking of ships and aircraft, and so on. The conventions which constituted the source of law could be listed in the court's statute. The desirability of such a court was related to the question of whether the existing system of universal jurisdiction was sufficiently effective to cope with a large number of international crimes. Moreover, the feasibility of its creation was linked to the political will of the majority of States and the technical and legal difficulties which States must overcome. Much time and energy had been spent on answering those questions in the Commission and other international legal forums.

62. The Thai delegation believed that, while the arguments over the desirability or feasibility of a court might continue, further consideration could, none the less, be given to the basis for its establishment; Thailand was therefore of the view that the Commission should prepare a draft statute for the court. In carrying out that mandate, the Commission should take into account not only the views on the subject expressed in the current debate, but also the written observations, to be transmitted by Governments, on the guidelines contained in the Working Group's report.

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63. Mr. ECONOMIDES (Greece) said that his delegation's views concerning the establishment of an international criminal court had been reflected in the statement made by the United Kingdom representative on behalf of the European Community and its member States; the Greek delegation wished to make some additional comments on the subject.

64. Greece shared the view that it was necessary to establish an international criminal jurisdiction, for reasons not only of suppression and punishment, but also of prevention. With regard to the Working Group's basic propositions (A/47/10, para. 396), his delegation made the following clarifications: it agreed that the court's statute should be prepared in the form of a multilateral treaty, concluded within the framework of the United Nations by the greatest possible number of States, which would then become parties to the instrument; that the court should exercise jurisdiction only over private persons, as distinct from States; that the court's jurisdiction should extend to all crimes of an international character, both those defined in the various treaties in force (for example, the Convention on the Prevention and Punishment of the Crime of Genocide, the four Geneva Conventions of 1949 on humanitarian law and the two Protocols additional to those Conventions), and in the draft Code of Crimes against the Peace and Security of Mankind or in future international conventions. International practice should, for the time being, be rejected as a source of international criminal law. The Commission hoped to complete the second reading of the draft Code by 1996; that would fill a large gap in international criminal law for the international community. With regard to the relationship between the draft Code and the court, Greece supported the most formal and organic relationship possible: each State which became a party to the draft Code should automatically accept the court's jurisdiction.

65. The court's jurisdiction should extend, at least in so far as the most serious international crimes were concerned, to all States which accepted, ratified or acceded to its statute, without any need for an additional declaration. Exclusive jurisdiction was preferable for all crimes defined in the Code or at least for all crimes against peace and security and the most serious war crimes. For other crimes, its jurisdiction could be concurrent, in which case priority for bringing criminal prosecutions would lie with national courts.

66. With regard to the practical arrangements for the court, there was no need for a permanent body, but rather a mechanism which could meet rapidly whenever necessary. The other mechanisms proposed (A/47/10, paras. 473-487) were not appropriate for the purposes of resolving the problem facing the Commission. Finally, a regular, independent and impartial judicial procedure should be established, with full respect for the rights of the accused. His delegation fully agreed that the Commission should be given a mandate to draw up a draft statute for an international criminal jurisdiction.

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(Mr. Economides, Greece)

67. With regard to State responsibility, the Special Rapporteur had proposed five draft articles concerning countermeasures; however, there was some doubt as to whether that question should be dealt with in the framework of international responsibility. In addition, the said provisions contained terms and expressions which were not clear, such as the expressions "adequate response" and "not to comply with one or more of its obligations" contained in article 11, and the expressions "the amicable settlement procedures available" and "the State ... does not cooperate in good faith in the choice and the implementation of available settlement procedures" contained in article 12. Article 12, paragraph 3, was ambiguous in its entirety, and the expression "out of proportion" in article 13 was vague. The same was true of the expression "conduct which ... is of serious prejudice to the normal operation of bilateral or multilateral diplomacy" contained in article 14.

68. Moreover, article 12 was very hard on the injured State. Whereas the State which had committed the internationally wrongful act seemed to have no obligations, the injured State was, in principle, required to exhaust all available settlement procedures before taking the appropriate countermeasure, to provide appropriate and timely communication of its intention, and even to renounce the countermeasure if it was not "in conformity with the obligation to settle disputes in such a manner that international peace and security, and justice, are not endangered", which provision deprived it of any possibility of reacting to serious or very serious offences. Clearly in such cases a third party would have to intervene in the interest of peace, international security and justice, and under the United Nations Charter, that third party could only be the Security Council. In any case, the Commission had not, as yet, given sufficient thought to the question of countermeasures; it should do so in connection with the provisions on collective security.

69. With regard to chapter IV of the report concerning international liability for injurious consequences arising out of acts not prohibited by international law, while appreciating the Special Rapporteur's efforts, he felt that no significant progress had yet been made. He hoped that the new guidelines laid down by the Commission would pave the way for progress to be made the following year.

70. Concerning chapter V of the report, he supported the planning of the Commission's activities for the term of office of its members and endorsed the decision to defer consideration of the topic "Relations between States and international organizations". In addition, as part of the Commission's long-term programme of work, further consideration should be given to the questions relating to succession of States, with particular reference to international organizations and the nationality of natural and legal persons, as well as the question proposed by the representative of Cyprus concerning the implementation of United Nations resolutions; the latter had assumed still greater importance following the recent Security Council decisions, which were binding on States and should be implemented rapidly.

(Mr. Economides, Greece)

71. Finally, in the context of the Decade of International Law, the Commission should pay special attention to its own function, which was to see to the progressive development and codification of international law, and should propose firm measures to strengthen and improve that function in terms of both quality and quantity.

72. Mrs. SKRK (Slovenia) said that the idea of creating an international criminal court had long preoccupied statesmen and scholars, but had yet to be put into practice by States. The entire international community was currently witnessing massive violations of humanitarian law and crimes against humanity in Bosnia and Herzegovina and, unless there was some response from the competent international bodies, the alleged offenders would never be brought to justice. Her country had been the first to suffer from the aggression of the army acting on behalf of the former Yugoslavia, and her delegation would therefore welcome any progress made by the Commission on the draft Code of Crimes against the Peace and Security of Mankind and on the statute for an international criminal court.

73. She supported the idea of establishing an international criminal court which, in her view, should be an independent and standing body, rather than an ad hoc organ. Although the court need not necessarily be a United Nations body, it could be associated with the United Nations system. The court should be established by a treaty between States parties, which treaty should include the court's statute; she agreed with the Working Group that the court should not have compulsory jurisdiction, in the sense of a general jurisdiction which a State party to the statute was obliged to accept *ipso facto* and without further agreement.

74. A better solution, and one which would achieve concrete results, would be to make acceptance of the court's jurisdiction a separate act, by means of an optional clause or on the basis of a special agreement. States not parties to the statute should also be able to bring cases before the court, by means of ad hoc acceptance of its jurisdiction. Clearly, the statute of the future international criminal court and the draft Code of Crimes should be two separate legal instruments, which States could ratify independently.

75. In order to guarantee the effectiveness of international criminal proceedings, a body separate from the criminal court should be established with the task of collecting evidence against alleged offenders and subsequently assuming the function of prosecutor. Other speakers had already mentioned the Commission of Experts established by Security Council resolution 780 of 5 October 1992 to collect evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia. The International Fact-finding Commission established under article 90 of Additional Protocol I of 1977 to the Geneva Conventions of 1949 was a good example of an impartial and independent fact-finding body.

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(Mrs. Skrk, Slovenia)

76. The tenth report of the Special Rapporteur (A/CN.4/442) drew a distinction between the law applicable by an international criminal court and its jurisdiction *ratione materiae*. Her delegation believed that the substantive and procedural norms that the court should apply were those of treaty law, since the direct application of international customary law might jeopardize respect for the principle *nullum crimen sine lege*. The court's jurisdiction *ratione materiae* could be a compromise between the exclusive jurisdiction of the court and the concurrent jurisdiction of the States parties to its statute, as long as the principle *non bis in idem* was respected; the court should not have an appellate character in relation to the national criminal proceedings of those States, however.

77. The court should also have exclusive and compulsory jurisdiction for grave war crimes, systematic violations of human rights, international drug trafficking, the taking of hostages and the crime of apartheid. Slovenia fully shared the position of other delegations which had described the "ethnic cleansing" of the Muslim population in Bosnia and Herzegovina as genocide.

78. International drug trafficking represented the trans-frontier social plague of the century; in order to achieve its effective suppression, that crime and related crimes should be treated as crimes against humanity, as in the case of its predecessors, piracy and slavery.

79. As to court's jurisdiction *ratione personae*, it should apply to alleged perpetrators of the crimes included within the court's jurisdiction *ratione materiae*, since such crimes involved political and other representatives of State bodies and other perpetrators not directly related to those bodies. In that respect, the problem of the treatment of juvenile offenders by an international court needed to be considered. In such cases, the court should comply with the provisions of the Convention on the Rights of the Child, which was applicable to every person below the age of 18. It should also be borne in mind that the First Additional Protocol to the Geneva Conventions of 1949 relating to the protection of victims of international armed conflicts explicitly prohibited the execution of the death penalty for an offence related to armed conflict on persons who had not attained the age of eighteen years at the time the offence was committed. Capital punishment was forbidden by the Slovenian Constitution and, therefore, her delegation believed that the death penalty had no place among the sanctions of an international criminal jurisdiction.

80. The problem of turning over a suspected offender to the court raised the sensitive question of the seat of that criminal body, if it was decided that it should be a standing body. In that respect, the idea of "ceded jurisdiction" as presented by the Working Group seemed attractive.

(Mrs. Skrk, Slovenia)

81. As to procedure, the accused should be offered the minimum procedural guarantees envisaged in article 14 of the International Covenant on Civil and Political Rights and the right to appeal on the basis of the "double hearing" principle as suggested by the Special Rapporteur.

82. In view of the clear need for an international criminal court, Slovenia felt that the General Assembly should renew the Commission's mandate so that it could continue its work on the matter as a priority issue.

83. Mr. SOLAIMAN (Egypt) said that recent events had made the community of nations aware once again of the need to establish an international criminal court. In addition, the currently prevailing atmosphere was favourable to the establishment of a new system, after the changes that had occurred in recent years in various parts of the world.

84. The establishment of an international criminal court, which was a matter of increasing urgency, would undoubtedly help accelerate the adoption and application of the Code of Crimes against the Peace and Security of Mankind. Naturally, the question required flexibility and careful consideration so as to incorporate in the new regime the proposals made by various delegations and thus achieve the greatest possible degree of participation.

85. Acceptance of the statute of the court should not involve automatic acceptance of its jurisdiction. Indeed, States should perhaps be free to accept that jurisdiction after they had acceded to the statute. In that context, the possibility of limiting the court's jurisdiction to certain crimes of an international nature such as genocide, international drug trafficking, air hijacking and other forms of international terrorism should be considered. With regard to the relationship between the statute of the court and the Code of Crimes against the Peace and Security of Mankind, his delegation felt that a distinction should be established between the two instruments so that a State could accede to either of them.

86. The statute of the court and the draft Code of Crimes against the Peace and Security of Mankind should be regarded as separate instruments, so that States could accede to the first without necessarily acceding to the second. Non-governmental humanitarian organizations such as the International Committee of the Red Cross should be able to have recourse to the court.

87. With regard to the specific recommendations made by the Working Group, he noted that there was general agreement that it would be preferable for the court to be established by means of a statute incorporated in a treaty between the States that wished to accede to that new international system; that the jurisdiction of the new court should be limited to crimes of an international nature defined in the international treaties in force, including the Code of Crimes against the Peace and Security of Mankind, once it was approved and had entered into force; and that at least at the first stage, the court's jurisdiction should be optional and binding only on States which accepted it,

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(Mr. Solaiman, Egypt)

and limited to persons rather than States. It would perhaps be best, initially, to establish a provisional mechanism which would meet when necessary. He noted that the international community had taken almost 50 years to recommend the establishment of an international criminal court; it should not wait so long to put the idea into practice. He was in favour of giving a mandate to the Commission to prepare a draft statute.

88. Mr. AL-BAHARNA (Bahrain) said that, on the question of establishing an international criminal court, it was regrettable that the Commission was not in favour of setting up a full-time judicial body, on grounds of the need to avoid an expensive institutional mechanism, the possible lack of work for the court and the absence of international experience in the exercise of criminal jurisdiction. In his opinion, the idea of a standing court should not be shelved, even provisionally. A court which was a compromise facility would betray a lack of conviction and would be a far cry from the original conception of a vigorous bench dispensing international criminal justice and playing a leading role in developing criminal jurisprudence. It was gratifying to note that some members of the Commission were of the view that permanence was of the essence if an international court were to function on the basis of judges totally independent of other concerns except the administration of justice. As far as costs were concerned, the Commission should concentrate on the legal aspects of the question rather than on its financial problems, which were the business of the General Assembly. He felt that the very existence of a court which was able to function without fear or favour from national pressure would be a source of confidence and, consequently, of work.

89. His delegation believed that the court should be established by means of a statute. The election of judges should follow the system of the International Court of Justice, which ensured regional representation. The system suggested in the report of the Working Group was not ideal. A system of a panel of potential judges was open to the familiar criticism that it was not a court in the traditional sense of the word. The Commission needed to keep alive the proposals for a court along the model of the International Court of Justice.

90. On the question of the court's jurisdiction, he was of the view that the court should not have compulsory jurisdiction in the sense of a general jurisdiction which a State party to the statute would be obliged to accept ipso facto and without further agreement. Each State would be free to accept the court's jurisdiction either ad hoc in relation to a particular offence or in advance for a special offence or offences. His delegation accepted the proposition that the basic postulate was to provide States with plenary control over the trial of persons within their jurisdiction. Even so, a system in which States were free to accept or confer jurisdiction in relation to a particular offence would severely curtail the powers of the court and, therefore, his delegation believed that jurisdiction should be conferred in advance with respect to offences listed by treaty or otherwise in the statute.

(Mr. Al-Baharna, Bahrain)

91. His delegation supported the Working Group's approach that a broad range of crimes ratione materiae should be established. Although it might have been advisable to restrict jurisdiction to the offences contained in the draft Code, it was currently clear that it would be unsafe to exclude the relevant conventions from the scope of the court's statute. Although the court's jurisdiction should be limited to crimes defined by treaties in force, it might be necessary to make an exception in favour of the draft Code, since if the Code were merely one of several multilateral conventions mentioned in the statute of the court, the Code would be excluded from the statute until it came into force. That would thus exclude the crimes of intervention and colonial domination, since such crimes were neither defined nor prohibited in any multilateral treaties in force, and that was not an ideal situation. In order to fill that gap, the Commission should consider the possibility of giving a special place to the Code, by making it provisionally applicable as an annex to the statute.

92. On the question of jurisdiction ratione personae, he believed that it was one of the most difficult issues and therefore required in-depth study. In practice, the question of personal jurisdiction of the court devolved into one of determining which State might confer on the court the jurisdiction without which it would not be able to proceed. Customary international law contained a variety of principles with regard to the exercise of jurisdiction by States which helped to determine whether the State attempting to exercise jurisdiction had indeed the right to do so as against another State. A different approach was therefore justified where competing criminal jurisdictions of States was not an issue. In cases of genocide, for example, the proposed court might be seized of a crime committed within one State by and against nationals of that very State. Consequently, jurisdiction based not on analogies of competing State jurisdiction but on the precise crime itself might recommend itself.

93. With regard to the relationship between the Code and the statute, his delegation agreed that a State might accept the statute and reject the Code. However, the Commission should examine the possibility of giving the Code a special place in the statute. The Code should be an integral part of the United Nations system with a permanent staff. The fear was that, by sharing administrative staff resources, the confidentiality of criminal records and evidence might be jeopardized. His delegation would hesitate to subscribe to the system of "regional courts" constituted to try specific crimes, since the essence of the exercise was to achieve universality.

94. The Working Group's report (A/47/10, annex, paras. 473-487) examined some proposals on alternative trial mechanisms, including advisory opinions of the International Court of Justice and decisions of national courts. The comparison showed that the proposed court was indeed the optimal solution.

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(Mr. Al-Baharna, Bahrain)

95. On the question of applicable law for the trials of offenders (ibid., paras. 68-80 and paras. 488-503), crimes should be of an international and grave character and must be clearly defined in an international treaty or other binding instrument. The Working Group was correct in rejecting the inclusion of crimes existing under customary international law. National laws should be referred to only in exceptional circumstances. Moreover, the Commission should consider that problem in the light of the solution presented in article 15 of the draft Code, which referred simply to the "general principles of law", a formula which was sufficiently broad as to encompass domestic legislation. As far as applicable procedure was concerned, the court should determine its own rules once it had come into being. The Statute and Rules of the International Court of Justice were appropriate examples. It was difficult for his delegation to comment on the precise formula modelled on Article 38 of the Statute of the International Court of Justice unless it had a clearer idea of what was included in "secondary law" (ibid., para. 501). Finally, an accused person should not be tried in absentia but should be lawfully brought before the court. The statute must provide that, if the court found that the accused had been unlawfully brought before it, it should dismiss the proceedings.

96. His delegation welcomed the proposals made in paragraphs 510 to 512 of the Working Group's report with the proviso that, with regard to the initiation of a case, the interests of justice required not only an independent prosecutorial system but also a preliminary inquiry or committal proceedings before a judicial officer. As far as the initiation of a case was concerned, any State party to the statute of the court should be entitled to bring a complaint before the prosecuting body, after which the latter would take over the conduct of the proceedings.

97. The report examined the problem of extradition in paragraphs 518 to 526. A regime for extradition or handing over of the accused would have to be an integral part of the statute, but its precise formulation was a question for consideration at a later stage. Similarly, the report examined the relationship between the court and the existing extradition system (paras. 550-557). Those matters should be addressed at a later stage after the core issues had been settled. As for the question of international judicial assistance (paras. 528-545), some rules on that topic would have to be elaborated, but a detailed treaty annexed to the statute was perhaps not the best solution.

98. The proposals with regard to the implementation of sentences were examined in paragraphs 546 to 549. Although the question of imprisonment following conviction should be considered later, the primary responsibility of carrying out the sentence should fall on the State conferring jurisdiction. However, the question of parole, review, etc., should be left to the relevant body within the court structure. That underlined the need for a permanent court.

(Mr. Al-Baharna, Bahrain)

99. His delegation invited the Commission to consider the possibility of other forms of penalties, including a regime of community service, for offenders who had been found guilty of genocide, racial discrimination and apartheid. A separate and compulsory protocol on the implementation of sentences should be provided so as not to disturb the general tenor or the statute.

The meeting rose at 1.05 p.m.

UNITED NATIONS
General Assembly
FORTY-SEVENTH SESSION
Official Records

SIXTH COMMITTEE
25th meeting
held on
Monday, 2 November 1992
at 4 p.m.
New York

SUMMARY RECORD OF THE 25th MEETING

Chairman: Mr. ZARIF (Islamic Republic of Iran)

later: Mrs. FLORES (Vice-Chairman) (Uruguay)

CONTENTS

AGENDA ITEM 129: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION (continued)

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The meeting was called to order at 4.10 p.m.

AGENDA ITEM 129: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION (continued) (A/47/10, A/47/95 and A/47/441-S/24559)

1. Mr. TSEPOV (Russian Federation) said that the International Law Commission had considered all aspects of the question of an international criminal jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism. The decision to set up a Working Group with the mandate not only to consider and analyse the various aspects of the issue but also to draft concrete recommendations had made it possible to formulate precisely a number of basic proposals which were necessary for further work on the question and which were reproduced in paragraph 396 of the Commission's report (A/47/10).

2. The Russian Federation fully endorsed the conclusion of the Working Group that an international criminal court should be created by a statute in the form of an international treaty. In his opinion, such a court would make it possible to interpret the Code of Crimes against the Peace and Security of Mankind in a more objective and uniform manner. However, it was important that States should be able to choose to become parties to the court's statute without at the same time becoming parties to the Code or recognizing the two texts at the same time. Likewise, his country believed that the court should not, at least in the beginning, be a permanent organ, but rather a flexible instrument or specialized mechanism which could be set in motion by States as necessary.

3. The fact that the Commission believed that the court should not have mandatory or exclusive jurisdiction showed that it had taken a balanced and pragmatic approach which would be likely to encourage the accession of as large a number of States as possible. It was also necessary for the court to have jurisdiction with respect to individuals and not States, at least for the first stage of its operations. Such an arrangement would thus be in full accord with the method adopted by the Commission with regard to the draft Code of Crimes against the Peace and Security of Mankind.

4. As the report had made clear, the Commission's examination of the jurisdiction ratione materiae ultimately revolved mainly around the question of the relationship between the draft Code and the future statute of the international criminal court. The jurisdiction of the court should be limited to crimes of an international character which were recognized by international conventions already in force, including crimes defined by the Code. In other words, the court's jurisdiction could be based as much on the provisions of the Code as on other international legal instruments relating to the culpability of individuals who had committed crimes of an international character; what was essential was that jurisdiction should not be confined exclusively to the provisions of the Code.

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(Mr. Tsepov, Russian Federation)

5. With respect to the question of the jurisdiction of the international criminal court regarding various categories of international crimes, Russia believed that it would be easier to reach a solution if States recognized the right to accept the jurisdiction of the court for certain crimes only.

6. The Russian delegation agreed that it would be better not to establish a direct connection between the question of the creation of an international criminal court and the completion of work on the draft Code of Crimes against the Peace and Security of Mankind. In the absence of such a connection, a delay on the first question would not automatically entail a delay on the second.

7. His delegation believed that once the Commission had completed its consideration of the question of the establishment of an international criminal court, it then fell to the General Assembly to confer a new mandate on the Commission which would consist in formulating a detailed draft statute and not in any more general or exploratory studies of the question.

8. Diverse and sometimes diametrically opposing views had been expressed regarding the question of the eventual establishment of an international criminal jurisdiction. The Russian Federation believed that it would be well worth the effort to continue work on that question and therefore to entrust the Commission with the task of elaborating the statute of an international criminal trial mechanism with the understanding, of course, that in doing so it would give due consideration to the characteristics of the world's main legal systems and to the comments and observations that Member States would submit in writing.

9. Mr. O'BRIEN (New Zealand) commended the Commission for having taken a new approach to the controversial question of the establishment of an international criminal court. Henceforth there would be general agreement on that subject and every opportunity should be taken to permit the Commission to fulfil its general function which was to ensure the progressive development of international law and to proceed in its work in an expeditious manner. The Commission's new approach did raise, however, a number of technical legal issues, some of a fundamental kind, such as the voluntary acceptance of the court's jurisdiction. The international community should therefore think through all of the implications of the new approach, without permitting itself to be influenced by contemporary crisis situations, however tragic they may be. In order to arrive at a solution that would stand the test of time, it was important to take a long-term and dispassionate view.

10. If the concept of international criminal jurisdiction was to be accepted by as large a number of States as possible, it was necessary to be flexible in determining the possible structure of an international criminal court. It may be that the creation of a permanent organ was not justified, and the Commission had undoubtedly shown creativity in its suggestion to create a mechanism which, once triggered, would lead to the immediate convening of an

(Mr. O'Brien, New Zealand)

ad hoc body whose composition would be determined strictly by the needs of each particular case.

11. New Zealand also noted the creative recommendations of the Commission regarding the jurisdiction of the court. His Government saw no need to establish a connection between the draft Code of Crimes against the Peace and Security of Mankind and the Criminal Code. Although progress towards completion of both sets of draft articles would be concurrent, the establishment of the court should not necessarily be subject to the adoption and entry into force of a Code.

12. With regard to the question of determining which crimes were to be subject to the court's jurisdiction, it might be better to adopt an evolutionary approach in which the court's jurisdiction would extend to international crimes specified in existing international treaties. Obviously, the Code of Crimes against the Peace and Security of Mankind would be among those instruments, as soon as it entered into force. A less disciplined approach, such as including, for example, crimes defined by international law in general but not by any specific treaties, could lead to uncertainty and could prevent the principle of international criminal jurisdiction from receiving the broad acceptance which it would need in its preliminary stages if it was to evolve and develop further.

13. New Zealand expressed its wish that the Commission's work on the establishment of an international criminal court should make rapid progress. To that end, the Commission should continue to consider separately the various aspects of the complex issues involved. It was also important that the Commission should receive as broad support as possible for its future work, and he hoped that the Sixth Committee would agree on a draft resolution to that effect.

14. Mr. VAN LIEROP (Vanuatu) said that law was constantly changing and that although Vanuatu was remote from traditional seats of power, it was part of the modern world. Just like economic activity, criminal activity had become internationalized and affected the islands of Vanuatu as much as the rest of the world.

15. Vanuatu was among those countries that believed there was a compelling need seriously to consider the possible establishment of an international criminal court. The unlawful traffic in drugs put the sovereignty of small countries at serious risk. The billions of dollars at the disposal of international criminal organizations made it very difficult for small island developing countries adequately to address the threat posed to them by the drug syndicates.

16. The difficulties of a small country such as Vanuatu were clear. Apprehending a major trafficker, trying him and then imprisoning him for a long period would pose major difficulties or even undermine the country's

financial and social stability. Hence the interest of an international criminal court that would try not only traffickers but also their accomplices, as well as individuals accused of war crimes or genocide, mercenary activities, arms trafficking or other violations of constantly evolving international criminal jurisprudence.

17. It was true that the idea of an international criminal court raised many problems that would have to be considered, analysed and resolved if the court was ultimately to achieve universal acceptance. No particular State would purposely expose its citizens to confusing rules of procedure or to standards of justice that were appreciably different from those to which they had come to expect. Nor could the citizens of a country be expected voluntarily to surrender the individual rights and protections. There was always a delicate balance of power that had to be observed between the State and the individual. Each delegation should weigh up those important considerations, especially those that concerned national sovereignty, when considering the issue.

18. His delegation none the less believed that none of those obstacles was insurmountable. The court should be established by a statute in the form of a multilateral treaty between States parties. Initially, its jurisdiction should be limited to individuals. It should also be limited to crimes of an international character defined in specified international treaties in force, including the Code of Crimes against the Peace and Security of Mankind, upon its adoption and entry into force. Lastly, the court's jurisdiction should be based on the consent of the States parties concerned.

19. The ad hoc mechanism advocated by the Commission should not lead to selective prosecutions. The individuals brought before the court should be able to count on its impartiality, independence and due process of law. For that reason it was vital to ensure that all countries would be capable of participating on an equal footing. An examination should be made of the means of helping those States which, due to economic circumstances, might not be in a position effectively to participate in proceedings in cases where they had consented to jurisdiction.

20. His delegation unreservedly supported the proposal to give the Commission a fresh mandate to allow it to continue its work on that very important topic.

21. Mr. SHI Jiuyong (China), speaking on chapter III of the report of the International Law Commission (A/47/10) entitled "State responsibility" recognized that although the Commission had not adopted the draft articles on the substantive consequences of an internationally wrongful act, it had made considerable progress in its work on the topic.

22. Within the set of problems connected with "State responsibility" the question of "countermeasures or instrumental consequences" was both complex and controversial. Generally speaking, his delegation agreed to the comments

(Mr. Shi Jiuyong, China)

on the status of "countermeasures" in the law of State responsibility as contained in paragraph 124 of the report. It also agreed to the paragraphs related to points raised in paragraph 124.

23. Even without attempting to determine whether countermeasures belonged to rules of general international law, one point was worth noting: if countermeasures did belong to rules of general international law, they could be codified and adapted to the new realities; on the other hand, if they did not belong to the rules of general international law, and yet the international community had a real need for them, the Commission could, in accordance with its Statute, formulate rules of countermeasures as part of its mission progressively to develop laws. It would be the responsibility of the Sixth Committee to endorse them. However, the crux of the matter was that in either case - codification or progressive development - the formulation of rules on countermeasures would be beset with difficulties and become bogged down.

24. At the present stage of development of the international community it was not possible to set up a law-enforcement organ comparable to what existed under domestic law. Under those circumstances, it was understandable that an injured State could only resort to self-help to compel the wrongdoing State to stop its wrongful acts and compensate it. Of course, there was no question of the injured State using force, exerting political and economic pressure, interfering in the other State's internal affairs or in any way violating its sovereignty. Moreover, countermeasures should not be disproportionate.

25. The question was not so simple if the history of countermeasures and the current reality of international relations were taken into consideration. Countermeasures might be feasible as a regime of international law among States whose powers were basically balanced. However, if there were considerable differences of power between States, countermeasures frequently represented power politics under the guise of equality and it was the powerful States that used them as an instrument to bully weak States. For many developing countries, countermeasures were frequently synonymous with aggression, intervention and gunboat diplomacy, as the Commission had noted in paragraph 124 of its report. It was sufficient to remember how in bygone days the great Powers ensured the diplomatic protection of their nationals abroad.

26. Another difficulty involved in the codification and progressive development of countermeasures was that although States were theoretically equal before the law, it was rare for small or weak States to be able to adopt with any hope of success any countermeasures against the great Powers, as it would unfailingly be to their own detriment. There was yet another difficulty, as the existence of an internationally wrongful act was the prerequisite for any countermeasure. The problem was determining the existence of such an act. As was stressed in paragraph 168 of the Commission's report, if such a decision was taken by the allegedly injured State, that would be to the advantage of the more powerful States. The

(Mr. Shi Jiuyong, China)

wrongdoing State could then claim to be the victim, and the actual victim could become the State accused of wrongful acts. If the decision were taken by a third party, the development of rules and countermeasures no longer seemed necessary. Allowing a third party to determine the existence of an internationally wrongful act was in itself an extremely difficult and complicated issue, that could hardly be resolved under that topic.

27. His delegation appreciated the fact that, in his draft articles on countermeasures, the Special Rapporteur had tried his best to reduce the concern caused by the unequal balance of power. Regrettably, the proposed draft articles not only did not eliminate the concerns of the developing countries but were also to a certain degree impractical. For example, while it was assumed that it was necessary to formulate rules on countermeasures, the proposed draft article 12 provided that an injured State should not resort to countermeasures before all the amicable settlement procedures available under general international law, such as the Charter of the United Nations, were exhausted. The article might be applicable to certain situations, such as international trade disputes, but not to others. In certain situations, it might be important to adopt countermeasures in time in order to prevent further aggravation of the injury caused. It might also be necessary to prevent the wrongdoing State from deliberately using the procedure of peaceful settlement as a delaying tactic allowing it to persist in wrongful acts.

28. Draft article 13 provided that countermeasures should not be out of proportion to the gravity of the internationally wrongful act and the effects thereof. That article, though in principle correct, was too abstract and relied not on objective criteria but on rational judgment alone, which in turn depended on the free will of the State taking countermeasures. The question as to whether the proportionality of countermeasures should be related to the objectives sought also needed study.

29. The Commission could not turn a blind eye to the practical significance of countermeasures in contemporary international relations, but the legal rules governing them should be both practicable and able to prevent them from becoming legal instruments for power politics. At the current juncture, it was still difficult to resolve the contradiction between those two requirements. The Commission should therefore exercise the utmost caution in dealing with countermeasures. A bad law was often more undesirable than no law at all.

30. Mr. LEHMANN (Denmark), speaking on behalf of the Nordic countries, welcomed the substantial progress achieved during the Commission's last session, which had made it possible to form a clearer idea of the structure of Part Two of the topic: State responsibility. Articles 6 to 10 of Part Two, which dealt with the material consequences of an internationally wrongful act, were still provisional and not reproduced in the report, but the statement by the Chairman of the Drafting Committee on those articles was highly recommendable reading and it could be hoped that a final version would be

(Mr. Lehmann, Denmark)

arrived at in 1993. The next group of articles related to the sensitive subject of "countermeasures" or "reprisals".

31. A full treatment of the topic would probably require a Part Three on the implementation of international responsibility. It would be advisable to prepare an outline for the Commission's next session since, if a mandatory system of dispute settlement was foreseen in respect of State responsibility, it would certainly have an impact on the chapter concerning countermeasures.

32. The Nordic countries agreed with the Commission that countermeasures were a reflection of the imperfect structure of the international society, which had not yet succeeded in establishing an effective centralized system of law enforcement. When such a system did exist, as was the case in individual national societies, there was no reason for the individual to take the law into his or her own hands. In the international society, such a system did not exist and it was difficult, therefore, to avoid the use of countermeasures which were firmly founded in customary international law. It was important, therefore, to strengthen the safeguards against abuses and to draft a strictly codified regime of countermeasures.

33. When the concept of "countermeasures" was analysed, two main conclusions could be drawn: first, there was no room for countermeasures where a mandatory system of dispute settlement existed; secondly, the use of force was not a legitimate means of enforcing one's own right. A distinction must be made between countermeasures in time of peace and countermeasures in time of war. It would be advisable to use that term for enforcement acts taken unilaterally by a State in time of peace and use the more pejorative term "reprisals" for time of war.

34. In the view of the Nordic countries, countermeasures should not be seen as having a punitive function but rather as a remedy designed to induce the wrongdoing State to resume the path of lawfulness. An extremely cautious approach should be taken since, in many instances, the powerful countries were the only ones with the means to avail themselves of the use of countermeasures to protect their interests.

35. In line with that cautious approach, the Nordic countries believed it would be better to merge articles 11, 12 and 13 into one article with the heading "Conditions of resort to countermeasures", which would start out by stating the cases in which it would be lawful to resort to countermeasures. Resort to countermeasures would then be conditional upon (a) the existence of an internationally wrongful act; (b) the prior submission by the injured State of a protest combined with a demand for secession and/or reparation; (c) the exhaustion of amicable settlement procedures; (d) appropriate and timely communication of the intention to resort to countermeasures; and (e) the principle of proportionality. A second article would deal with prohibitive measures, along the lines of article 14 proposed by the Special Rapporteur.

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(Mr. Lehmann, Denmark)

36. With regard to the question of countermeasures in the context of articles 2, 5 and 6 of Part Two, already adopted in first reading, the Nordic countries saw no merit in reopening the debate on articles already adopted, the formulation of which was sufficiently broad to allow for each case to be determined on its own merits.

37. In conclusion, he raised two points which were in his view linked to State responsibility. The first was the distinction between crimes and delicts in the context of countermeasures, a distinction which pointed towards a close relationship between the question of State responsibility and the draft Code of Crimes. The Commission should therefore keep progress on the two texts in step. The second was that of international liability, even though in that case the link with the subject under consideration was less close. In any event, it should be kept in mind that the three topics were interrelated and covered the whole range of State responsibility from full-fledged crime to strict liability.

38. Mr. CALERO-RODRIGUES (Brazil) said that the excellent collaboration between the International Law Commission and the Drafting Committee had resulted in completion of the draft articles relating to the substantive consequences of internationally wrongful acts which, while very important, were relatively easy to determine.

39. The ground was far less solid with regard to "instrumental" consequences, also known as "countermeasures", a formulation which had been considered preferable to "reprisals", "sanctions" or "measures of retorsion". The Special Rapporteur had defined countermeasures as measures that a State might take in response to breaches of international obligations causing injury to that State. Countermeasures themselves could be considered as violations of international obligations; however, as established in article 30 of Part One of the draft articles, wrongfulness was precluded where the countermeasures were taken in response to an internationally wrongful act committed by another State. While the definition proposed by the Special Rapporteur was technically unimpeachable, it might be asked whether it was not one-sided as it referred only to the aspect of non-compliance with an obligation. Moreover, the notion that the injured party should take the law into its own hands represented a lower stage in the evolution of legal techniques and confirmed that resort to countermeasures was an admission of the inadequacy of the international legal order.

40. It was a fact that States were unequal in size, wealth and strength. Yet, before the law and by virtue of the principle enshrined in the Charter of the United Nations, all States were, or should be, equal. Recognizing and codifying the legitimacy of countermeasures meant denying the equality of States and actually heightened their inequality. How could it be expected that any countermeasures which might be taken by a small State against a much stronger State could force that latter State to cease its wrongful conduct? Thus, while the Brazilian delegation understood the position of those members

(Mr. Calero-Rodrigues, Brazil)

of the Commission who were resolutely opposed to including a chapter on countermeasures in the draft articles on State responsibility, it did not necessarily hold the same view. For the time being, it had to be recognized that countermeasures, despite their shortcomings, had to be incorporated in any legal regime on State responsibility, in the hope that a more equitable system for taking effective action against internationally wrongful acts might one day be devised. What counted was to codify countermeasures in such a way as to limit as much as possible the iniquitous consequences to which they might give rise.

41. In that context, the issue of the exhaustion of peaceful settlement procedures was of fundamental importance. Determination of the existence of an internationally wrongful act should not be left entirely to the discretion of the allegedly injured State. Another important condition for resort to countermeasures was that the allegedly injured State should inform the State concerned of its intention to use countermeasures against it. States should not in fact be taken by surprise; they should be given time to consider the situation and, when appropriate, to call a halt to their actions.

42. The primary purpose of countermeasures was to compel States to respect their obligations. If that purpose could be achieved through means such as peaceful settlement or voluntary action on the State's part, there was no reason to resort to countermeasures. Accordingly, the articles relating to countermeasures should state that purpose expressly and exclude equally clearly any punitive aspect. If such a limited and precise purpose was thus recognized for countermeasures, the Brazilian delegation saw no reason to refer to "interim measures of protection". Countermeasures were in themselves interim measures of protection: there was, therefore, no need to create a special category of measures to which States could resort without having exhausted the possibilities for peaceful settlement. Lastly, in respect of the principle of proportionality, his delegation could find no fault with the formulation suggested by the Special Rapporteur.

43. Even after the legitimacy of resort to countermeasures had been established, certain obligations remained untouchable, as established in draft article 14. It was clear that peremptory norms of international law and the obligation not to resort to the threat or use of force, which was expressly stated in the Charter of the United Nations, could not be set aside on the grounds of resort to countermeasures. It was necessary, then, to reformulate paragraph 2 of the article which, in its reference to "the threat or use of force", might be considered an interpretation, and an unwelcome one, of the Charter. Careful thought should be given to the question as to whether the prohibition should be limited to the use of armed force or should also apply to other extreme measures of coercion. While it believed that the prohibition should actually be widened, his delegation felt that the provision must be drafted with the utmost care. Excluding erga omnes and erga omnes partes obligations from the list of exceptions followed logically from the very definition of countermeasures, which could be applied only to the wrongdoing

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(Mr. Calero-Rodrigues, Brazil)

State. Finally, while the reference to "fundamental human rights" was acceptable, the expression "normal operation of bilateral or multilateral diplomacy" needed to be clarified. He expected the Commission to give careful consideration to paragraphs (b) (i) and (b) (ii) of article 14, paragraph 1.

44. Mr. MIKULKA (Czechoslovakia) welcomed the Commission's progress in elaborating the draft articles on the "substantial" consequences of an internationally wrongful act. In respect of the issue of "instrumental" consequences, considered by the Commission in 1992, he would summarize the major points of Czechoslovakia's position.

45. In view of the rudimentary nature of the centralized system for enforcing international law, individual means of constraint or coercion formed an essential part of such law. The Commission had chosen to designate such means by the word "countermeasures", which encompassed the various measures which could be legitimately taken by an injured State against a State which had committed a wrongful act. While countermeasures were open to abuse, that was no sufficient reason to conclude that they had no place in the legal regime of State responsibility. It was important not to halt the evolution of current legal thinking relating to countermeasures; the aim should rather be to combine all the progressive elements that had emerged in recent practice with a view to formulating clear and precise norms, which would strengthen the guarantees against abuse.

46. The Czechoslovak delegation agreed with the Special Rapporteur that measures of retorsion did not fit into the category of countermeasures. Measures of retorsion under any circumstances constituted licit, albeit unfriendly, measures recourse to which was admissible even where no internationally wrongful act had been committed. The third report also referred to reciprocity measures as a means of coercion. Such measures were not a distinct category but ought rather to be considered as a specific form of countermeasures, the only difference being that reciprocity measures might be intended either to secure cessation of the wrongful act and compliance with the secondary obligation of reparation or to result in simple derogation of the primary obligation between the wrongdoing State and the injured State. The problem was, therefore, to distinguish between reciprocity measures which were essentially "reparatory" in purpose and those which were "derogatory" in purpose.

47. The Special Rapporteur had several times indicated that, at the current stage, the International Law Commission should deal with the question of the consequences of an internationally wrongful act in the context of delicts, and only thereafter consider the question of the consequences of international crimes. The Special Rapporteur referred to the concept of self-defence, which arose only in the context of violations of the prohibition on recourse to force which, because they infringed a peremptory norm of international law, fell within the category of international crimes.

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(Mr. Mikulka, Czechoslovakia)

48. With regard to the term "sanctions", his delegation subscribed to the view taken by the Special Rapporteur, who preferred to use that expression solely to designate the measures taken by an international body.

49. Turning specifically to the first three draft articles devoted to countermeasures, he endorsed the finality of draft article 11, which was to reduce possibilities for premature, and thus abusive, resort to countermeasures, by subordinating the right of such resort to the prior definition by the injured State of the conduct that it considered wrongful, to submission of a demand of cessation and of reparation to the State which had committed the act, and to the absence of an adequate response to that demand.

50. With regard to draft article 12, paragraph 1 (a) of which set forth the obligation to exhaust all the amicable settlement procedures available, his delegation shared the views of several members of the Commission who feared that an obligation drafted in such general terms might place the injured State at a disadvantage. Considerable judgement should be exercised in envisaging that obligation, for in the case of persistent wrongful acts, extremely complex situations might arise in which the injured State should not be exposed to interminable proceedings, given that the acts at issue continued to take place.

51. Paragraph 3 of article 12, the purpose of which was to rule out resort to countermeasures not in conformity with the obligation to settle disputes in such a manner that international peace and security, and justice, were not endangered, should have a more general vocation than that assigned to it by its current wording, which limited its scope to the exceptions set forth in paragraph 2 of the same article.

52. The proportionality which was the subject of draft article 13 was one of the fundamental conditions rendering countermeasures legitimate. Any evaluation of proportionality, whatever the criterion applied, included a substantial component of subjectivity, and thus, an element of uncertainty. The question was thus one which called for more thorough analysis and which the Commission should consider more fully at its next session.

53. Article 14, devoted to prohibited countermeasures, or, in other words, to exceptions to the general rule set forth in article 11, would benefit from being placed immediately after that article. In addition to considerations concerning the order in which the articles were placed, account might also thereby be taken of the concerns of those who wished to see the Commission begin by drafting rules establishing safeguards against possible abuses of recourse to countermeasures.

54. As to the substance, his delegation endorsed the idea expressed in paragraph 1 (b) (iii), that an injured State must not resort, by way of countermeasure, to any conduct which was contrary to a peremptory norm of general international law. Admittedly, the prohibition on the threat or use

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(Mr. Mikulka, Czechoslovakia)

of force in contravention of Article 2, paragraph 4, of the United Nations Charter referred to in subparagraph (a), as well as some at least of the rules of international law on the protection of fundamental human rights referred to in subparagraph (b) (i) of paragraph 1, were part of jus cogens. However, the manner in which that prohibition was set forth in Article 14 might give rise to unacceptable a contrario interpretations. From that standpoint, paragraph 1 of Article 14 should be redrafted.

55. Paragraph 1 (b) (ii), which prohibited any conduct which was not in conformity with the rules of diplomatic law, referred to a category of norms that could not be classed on the same level as peremptory norms or those relating to the protection of fundamental human rights. It would be difficult to accept that the prohibition on countermeasures should be equally absolute in such cases. In particular, the prohibition on recourse to reciprocal measures in the framework of diplomatic law did not seem to be justified. As international practice showed, recourse to countermeasures in that sphere, while considerably limited, was not entirely prohibited.

56. Paragraph 1 (b) (iv), which prohibited countermeasures that consisted of a breach of an obligation towards any State other than the State which had committed the internationally wrongful act, represented a useful safeguard against the extensive employment of countermeasures.

57. His delegation subscribed to the view that the prohibition on recourse to the threat or use of force in contravention of Article 2, paragraph 4, of the United Nations Charter included not only armed force but also any extreme measures of political or economic coercion referred to in paragraph 2 of Article 14 which jeopardized the territorial integrity or political independence of the State against which they were taken. One was nevertheless entitled to wonder whether it was appropriate, in a series of draft articles on State responsibility, to provide an interpretation of one of the fundamental provisions of the Charter of the United Nations. It seemed that that paragraph created more problems than it solved.

58. Lastly, with regard to draft article 5 bis, which dealt with the question of a plurality of injured States, his delegation, while subscribing to its content, took issue with the use of the concept of erga omnes obligations in the commentary accompanying that article One gained the impression that the question of a plurality of injured States was comparable with that of the infringement of an erga omnes obligation, which was not in fact the case. The problem of a plurality of injured States arose in connection with any regime of multilateral obligations, and not solely with regard to erga omnes obligations. It was on those grounds that it was studied in the context of international delicts. On the other hand, erga omnes obligations were part of jus cogens and consequently related exclusively to international crimes, a question which the Commission had not yet begun to consider.

59. Mrs. Flores (Uruguay) took the Chair.

60. Mr. MOMTAZ (Islamic Republic of Iran) felt that the expression "countermeasures" adopted by the Commission was entirely appropriate in that it implied posteriority or a reaction to a previous action and thus encompassed the full range of means of pressure to which a State injured through a breach of an international obligation by another State could resort in order to ensure that its right was respected.

61. Nevertheless, the legal regime of countermeasures as causes for exoneration from State responsibility could not fail to arouse fears. One wondered whether an attempt at codification of the subject might not tend to legitimize countermeasures as an instrument par excellence of the hegemonic activities of certain Powers. Furthermore, far from constituting a remedy intended to encourage the wrongdoing State to return to the path of legality, in most cases countermeasures in fact merely inflamed relations between the parties to the conflict, thereby rendering them still more intransigent.

62. The fact remained that, in a society at disorganized as the community of States, characterized by the absence of international mechanisms responsible for application of the law, States could not be denied the right to react to breaches of international law which damaged them, by resorting to countermeasures, albeit at the risk of vitiating the very existence of international law. In those circumstances, regulation of the right to resort to countermeasures might offer certain safeguards to the most disadvantaged States and thereby make it possible to address the abuses that might result from the de facto inequality of States, while reducing the number of State initiatives.

63. However, while considerable State practice already existed, it was not possible to rest content with a codification or systematization of the existing rules in that field, for fear of perpetuating a discredited order. On the contrary, the international community must, whenever the need arose, depart from those precedents and embark more resolutely on the road to renewal while working for the progressive development of international law with a view to limiting recourse to countermeasures.

64. The first step would therefore be to give a precise definition of what was understood by an injured State and a wrongful act, and hence to limit the number of States able to claim the right to resort to countermeasures. In many cases, prompted by considerations which were more ideological than legal, States had claimed such a right, setting themselves up as the defenders not only of their own rights, but of international law. That question had arisen in the case concerning Military and Paramilitary Activities in and against Nicaragua. The International Court of Justice had on that occasion accepted the notion of a "legally affected" State, and thus rejected the claim of certain States to be conducting a would-be "actio popularis" on behalf of the international community without having received a specific mandate for that purpose. In that connection, draft article 5 bis, by giving consideration

(Mr. Momtaz, Islamic Republic of Iran)

only to those cases in which several States had been injured by the same act, was liable to give rise to confusion and to give such claims some legal cover.

65. He welcomed draft articles 12 and 13 submitted by the Special Rapporteur to the extent that they answered the concern expressed as early as 1934 by the Institute of International Law that the use of reprisals should always remain subject to international control and could in no case be exempt from discussion by other States. Both articles were also in line with the commentary to article 30 of the draft articles on the responsibility of States submitted in 1979 by the International Law Commission, which stated that it was only in cases determined by international law that international law granted a State which had been injured by an internationally wrongful act committed against it the faculty of resorting to a countermeasure.

66. Article 12 as such, which was devoted to conditions of resort to countermeasures, did not include the serving of notice among those conditions. Nevertheless, paragraph 1 (b) did stipulate that the injured States should make an "appropriate and timely communication of its intention" to resort to countermeasures. It was important to make a distinction between the serving of notice, which consisted in asking the State guilty of the wrongful act to put an end thereto and, if need be, to make the necessary reparations, and the communication of an intention to resort to countermeasures if such notice remained unheeded. Paragraph 1 (b) made mention only of the latter possibility.

67. Paragraph 2 (b) of the same article, which included cases where the wrongdoing State sought to avoid a peaceful settlement of the dispute between it and the injured State, concerned only those cases where the dispute between those States did not come under the compulsory jurisdiction of the International Court of Justice. In such cases, it was clear that no difficulty arose as to the choice and implementation of settlement procedures. Even though any judicial settlement by definition offered the litigants the advantage of not having to worry about such questions, his delegation was of the view that article 12 should limit itself to solutions involving the International Court of Justice, which was the sole judicial body enabling parties to a dispute to request the Security Council to enforce a judgement, since the Security Council was empowered, if it deemed it necessary, to make recommendations or to decide on measures to be taken to that end. Given those guarantees provided by the Charter of the United Nations, it must be admitted that the right of the injured State to resort to countermeasures in the case in point no longer existed.

68. Draft article 14, which listed the countermeasures to which the injured State could not resort, called for three remarks. First, the prohibition of countermeasures violating the international law rules governing human rights could not be absolute, as was apparent from the approach taken by provision which chose to restrict it to fundamental rights. Nevertheless, it would perhaps be desirable to find a formula for clarifying further the human rights

(Mr. Momtaz, Islamic Republic of Iran)

categories to be protected. The current wording of the article did not offer sufficient guarantees for protecting certain rights, inasmuch as it might authorize the injured State to engage, as a countermeasure, in intolerable acts, such as mass expulsions of foreigners. In that respect, although a universal prohibition in that area was taboo, several regional instruments, in particular Protocol No. 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, the Pact of San José of 22 November 1969 and the African Charter on Human and Peoples' Rights expressly prohibited mass expulsions of foreigners except in the cases of a threat to independence or security provided for by the first two texts.

69. Secondly, it was regrettable that none of the provisions of article 14 expressly prohibited countermeasures in case of violation of obligations arising from multinational conventions on protecting the environment, designed to safeguard the environment as part of the common heritage of humanity, since it was unimaginable to resort to countermeasures within the framework of such conventions.

70. Thirdly, article 14, paragraph 2, could be usefully supplemented by a reference to the complete interruption of economic relations and communications, which led to the political and economic destabilization of the State so affected, and which therefore could be decided only by the Security Council under Chapter VII of the Charter.

71. Finally, he hoped that the work of the International Law Commission would proceed more rapidly during its coming session and that that session would provisionally adopt the articles on the juridical regime of countermeasures which, to be acceptable, should be accompanied by firm guarantees in favour of the weaker States.

72. Mr. SALEEM (India) agreed with the view expressed within the Commission that the subject of countermeasures should be treated with extreme caution and under strict conditions of regulations, lest they be used and even abused by the economically strong States against weaker States. The International Law Commission should therefore carefully define the objectives of countermeasures and the necessary preconditions before invoking them and, finally, specify the principles governing their use.

73. Furthermore, the International Law Commission should also carefully provide for the role of peaceful settlement of disputes, the proportionality test, the relevance of interim measures and the scope of the powers and functions of multilateral instruments, bodies and organizations including the Security Council of the United Nations in the maintenance of international peace and security. Above all, it should address the applicability of general principles of international law, obligations of erga omnes character and the rule of jus cogens, which were also relevant to the effort for shaping an acceptable regime governing countermeasures.

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(Mr. Saleem, India)

74. In regard to the function of countermeasures, he was of the opinion that, first of all, self-help should generally be discouraged; secondly, respect for law should be promoted; thirdly, disputes should be settled by recourse to one of the various means mutually acceptable to the parties; fourthly, emphasis should be given to the positive and constructive role of countermeasures; fifthly, countermeasures of a punitive nature should be discouraged; sixthly, the territorial integrity and political independence of States should be protected, and lastly, cessation of the wrongful act and due compensation or reparations appropriate to the injury should be obtained. Any countermeasures regime ought expressly to forbid States from encouraging punitive reprisals or countermeasures.

75. Any countermeasures should be in response to the following conditions; first, a wrongful act on the part of a State must exist; second, a clear demand for cessation and reparation should be addressed to the wrongdoing State; third, in the event of disagreement as to the wrongfulness of the act in question and the response demanded, there should be prompt resort to procedures for the settlement of differences if there was reason for such resort. All dispute settlement procedures acceptable to the two parties should be sought out in good faith. Next, due recourse to the provisions of the Charter of the United Nations, to the United Nations Organization and to other authorized multilateral institutions or organizations must be considered; also, the wrongful act itself must be of an unacceptable nature and not a minor or technical one. Finally, the State which had committed the wrongful act should not be able to deny reparation to the injured State or to persist in the alleged violation.

76. Furthermore, once invoked, countermeasures should be pursued within a certain limit; first, the fundamental principle should be that the use of armed force was prohibited in the exercise of countermeasures in response to alleged wrongful acts which did not themselves involve recourse to armed attack or force in the first instance. The principles of the Charter which were laid down in Articles 2 (IV) and 51 should be fully respected; secondly, in order to be recognized as lawful, countermeasures, when resorted to, should conform to principles of international law; thirdly, countermeasures should not be taken or suspended without recourse to an institutional framework and they should provide for some degree of enforcement of the obligations under such a framework; fourthly, countermeasures must always meet the test of reasonableness or proportionality, and thus should be proportional to the seriousness of the alleged wrongful act and should be designed to achieve the objectives of cessation of the alleged wrongful act and settlement of the dispute, if any; fifthly, in no case could the test of proportionality be stretched to justify totally unequal means, methods and measures or to obtain unequal results as compared to the consequences of an alleged wrongful act; sixthly, countermeasures of a political and economic nature should not have the effect of jeopardizing the territorial integrity or political independence of the alleged wrongdoing State. In addition, a strict delimitation should be made between countermeasures stricto sensu and economic and political measures

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(Mr. Saleem, India)

which States often take without affecting the rights or obligations of States under international law. However, States should not resort to countermeasures when only their interests are infringed and not their rights. It should also be noted that the use of economic instruments as a strategy and as a countermeasure was strictly governed by several international, bilateral and multilateral agreements and by self-contained regimes.

77. Likewise, responses to violations of human rights should be governed by the applicable international conventions and treaty regimes and should not be brought within the purview of the proposed countermeasures regime.

78. His Government supported the view that any self-help measures which States would take against so-called offending States could not include measures against the States or nationals in violation of principles relating to the protection of human rights and the treatment of foreign nationals.

79. In addition, while regulating the countermeasures regime, caution should be exercised in drawing the proper conclusions with regard to erga omnes obligations and jus cogens principles. Unless the intended limitations could be specified, the Commission could dispense with them. The Commission should also carefully examine the problem of "differently injured States".

80. Finally, his Government strongly supported the view that the countermeasures regime was entirely subject to the principles of the Charter and the powers and functions of the Security Council to meet all contingencies arising from threats to, or real acts affecting, the maintenance of international peace and security.

81. Mr. MAJDI (Morocco) said that he would start with the question of eventually establishing an international criminal court. Morocco recommended realism and prudence on that subject, even though recent events had shown that an international criminal court could have solved many problems and helped to avoid some conflicts. However, such a court would make it possible to standardize prosecution of the most serious international crimes under a uniform law.

82. The benefits of that initiative should not prompt the Commission to forget the complex problems that remained to be overcome, difficulties which the work of the Commission had highlighted. The process could be started by creating a permanent ad hoc court under an international treaty the parties to which would be the ratifying States. The idea that a State party to the statute would not ipso facto be bound to accept the authority of the court was interesting and would make it possible for the statute to obtain broad acceptance. The authority of the court would be accepted on a case-by-case basis and would therefore be at the discretion of States. If the court were to take that shape, only States would be able to bring actions before it and to deal with the most serious international crimes committed by individuals, without denying the concurrent authority of national courts.

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(Mr. Majdi, Morocco)

83. The statute of the international criminal court and the Code of Crimes should be separate instruments so as to encourage States to become parties to the statute without being parties to the Code, even though the international criminal court made it easier to prosecute crimes listed in the Code. The court should be composed of independent judges of high moral and professional qualities. They would have to judge only criminals as individuals without seeking to reach the State through such individuals; otherwise, States might justifiably believe that the court was being transformed into an instrument of propaganda or defamation.

84. In conclusion, the Commission and the States should work in perfect harmony on the question of the court. The Commission should take into account the level of acceptance of the idea in the international community, and States should adjust their actions accordingly. The information provided in the report under review described the problems in full detail. Morocco would join with the other States in support of the draft. Moreover, States must be permitted to ponder the proposed instrument, in order to prevent it from assuming a precarious character as a result of being insufficiently thought out.

85. As regards Chapter III of the report, he gave more specific attention to the question of countermeasures. The controversy surrounding that issue was aggravated by the enormous differences existing in international society between militarily strong States and weak States and between rich States and poor States. For some States codification of countermeasures would serve only to crystallize those differences in order to sanctify the wish of the strongest States. This fear was reinforced by the idea that countermeasures were related to a particular historical situation: the period when the majority of the recently independent countries had become much more objects than subjects of international law. His Government was therefore afraid that, by codifying a dubious practice, the primacy of international law would be sacrificed. However, others had expressed the view that international experience reinforced the lesson every day that recourse to countermeasures was a time-honoured practice. Therefore, it would be better to regulate countermeasures and to apply the practice of subjecting them to strict conditions, so as to protect the weakest States and promote respect for law.

86. On that point, his delegation fully endorsed the comments contained in paragraph 133 of the Commission's report. The regulation of countermeasures was a constructive means of promoting respect for the law. If it was to be effective, however, there was first a need to clarify and define the concept of countermeasure and distinguish it from other similar concepts, such as reprisals, sanctions and self-defence - which was a response to a crime, whereas countermeasures were in response to a delict.

87. Secondly, while countermeasures were justified by the aim of halting wrongful acts, there was a further requirement that the alleged wrongdoer should have been explicitly called upon to reconsider the act committed. It

(Mr. Majdi, Morocco)

might even be prepared to make redress if so requested. The alleged author State should therefore receive prior notification of the breach complained of, thereby enabling it to know what obligations it had violated, as the Commission clearly stated.

88. From that twin standpoint, the conditions provided for by the Special Rapporteur in draft article 11 thus offered a fitting response to the problem. They did not, however, resolve everything, and there were at least three points which remained problematical. First, it could be asked what was understood by the term "wrongful act" and who was qualified to judge any act as such. In the same vein, who was competent to say whether a response was adequate or otherwise: was it the injured State, the wrongdoing State or a third party? The second difficulty was knowing whether the injured State was bound to ascertain in advance that one of its rights had been effectively violated before resorting to countermeasures, or whether the latter were sanctioned by the mere bona fide conviction on the part of the State that it had been injured. In the Moroccan view, such a reaction would be excessive unless substantiated by corroborating evidence, such as, for example, the refusal by the alleged wrongdoer to negotiate or to resort to an amicable settlement. The third problem was that the term "injured State" contained in draft article 11 was insufficient; the nature and gravity of the injury sustained should also be specified.

89. Various other aspects of the draft called for comment. First, in sanctioning reaction to a wrongful act, a distinction should be made between the breach of an international obligation giving rise to responsibility and the prejudice which led to the resort to countermeasures. As the Commission stressed, that distinction had practical consequences; if injury was not a prerequisite for the sanctioning of reaction to wrongfulness, any breach of the law could give rise to countermeasures.

90. The condition of "prior exhaustion of dispute settlement procedures" was provided for under Article 33 of the Charter. That condition appeared to favour the wrongdoing State to the detriment of the injured State, given that negotiations could be protracted and that the legal process sometimes took years to complete. It would therefore be unfair to oblige the injured State to refrain from taking countermeasures throughout that entire process, particularly if it was not certain that the other State would in good faith enforce the decision eventually handed down. It would accordingly be advisable to ensure that the exhaustion of peaceful settlement procedures was not only a prerequisite for resort to countermeasures, but also a parallel obligation. The right to take countermeasures would accordingly be suspended as soon as the wrongdoing State agreed to a dispute settlement procedure.

91. Concerning the problem of proportionality, the Commission's report stated that the conduct of the State should be proportionate to the two legitimate aims of countermeasures, namely cessation and reparation. It should be recognized, however, that that principle, despite its importance, was still

very difficult to apply in practice, since as long as the assessment of the gravity of a wrongful act and of its effects was left to the appreciation of the injured State, abuses would inevitably occur. With a view to limiting that risk, it would therefore be desirable to entrust the assessment to a third party.

92. Mr. GODET (Observer for Switzerland) stated that the legal system applicable to the measures which an injured State could take against a State which had committed an internationally wrongful act was surely one of the most difficult issues in the entire subject of State responsibility. Countermeasures, however, were not the only means of enforcing international law where an obligation under international public law had been breached. Although the international community had not yet succeeded in establishing an effective central system which could wholly guarantee respect for the law, the role of peaceful settlement procedures which offered States the real possibility of finding a satisfactory and final solution to their disputes could not be minimized. That said, the regulation of countermeasures was a constructive means of promoting respect for the law as long as the aim was the cessation of wrongful acts.

93. Bearing in mind the purposes of a system of countermeasures - to resolve rather than exacerbate disputes - a careful limit should be placed on the scope of enforcement of the unilateral means of action to which a State could legitimately resort in order to counter a breach of international law which had caused it prejudice. The admissibility of countermeasures was likely to give rise to abuses and to entail a risk of escalation prejudicial to international stability. It was therefore essential to ensure that countermeasures were subject to particularly strict conditions which would encourage States to settle their grievances by the available amicable settlement procedures and dissuade them from resorting to means which would, in short, constitute the ultima ratio intended to persuade the wrongdoing State to resume compliance with the law.

94. With regard to terminology, most members of the International Law Commission rightly believed that the term "countermeasures" was preferable to the term "reprisals" in that it was a neutral term which, without wholly eliminating the punitive element, more aptly reflected the objective of restoring the symmetrical positions of States by means of negative measures. It might be appropriate to include in the draft articles a definition of countermeasures which stated that they should not be repressive and were intended to provide a remedy aimed at ending a wrongful act and making reparation for the injury caused, and which underlined their temporary nature. Action undertaken in the context of countermeasures should be suspended or withdrawn as soon as the wrongdoing State made reparation for the injury and again complied with international law or participated in good faith in the peaceful settlement of the dispute.

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(Mr. Godet, Observer, Switzerland)

95. The Special Rapporteur was right in proposing not to deal with the instrumental consequences of crimes until a later stage so as to establish the distinction between crimes and delicts in the context of countermeasures. It was not impossible, however, that the conclusion would be reached in due course that countermeasures for delicts and for criminal acts could not be dealt with separately.

96. In connection with draft article 11, some members of the International Law Commission had thought that besides the two conditions referred to in the draft - the existence of an internationally wrongful act and the absence of adequate response from the wrongdoing State - there should also be a third, namely, that countermeasures could be resorted to only in response to an unlawful act having significant or unacceptable consequences. Switzerland could not accept that view, its own position being that the gravity of the unlawful act should not constitute a criterion of permissibility of countermeasures although it was certainly a decisive factor the injured State would have to take into account when considering the question of the proportionality of the countermeasure to be applied.

97. In connection with the question of establishing the existence of an internationally wrongful act it had been feared that the injured State might let itself be guided by subjective criteria. However, objective indices or indeed objective proof would have been established after the exhaustion of amicable settlement procedures, a preliminary obligation imposed in principle upon the injured State intending to resort to countermeasures. Moreover, a State which based its conduct upon the existence of an internationally wrongful act had to be aware that it might be held responsible if it turned out that no breach of an international obligation had in fact occurred.

98. Lastly, so far as the wording was concerned, draft article 11 would gain in clarity if the expression "adequate response" were spelled out and if language were added to emphasize the temporary nature of the countermeasures, which, in his delegation's view, had to cease as soon as their purpose had been achieved.

99. Turning to draft article 12, he said that the obligation of the exhaustion of all amicable settlement procedures set forth in paragraph 1 (a) was, in his view, the element upon which the entire countermeasures regime was hinged. So long as States had available to them means of settlement, from the simplest forms of negotiation to the most elaborate judicial procedures, recourse to countermeasures could not be justified. Only in the event of failure of a settlement procedure or in the absence of resort to such a procedure for certain permissible and strictly limited reasons - for example, if there were danger in delay - could a State be authorized to employ countermeasures. The use of countermeasures as a means of inducing the wrongdoing State to accept a settlement procedure that would lead to a legally binding decision as to the unlawful nature of an act and as to matters of reparation could not be legitimized. A distinction should be drawn in that connection between countermeasures and measures of conservation.

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100. With regard to paragraph 3 of draft article 12, the Special Rapporteur had acknowledged that the wording was infelicitous. The question raised was whether the countermeasures which were exempt from the requirement of the exhaustion of amicable means of settlement should or should not be subject to the requirement of compatibility with the exigencies of peace and security. In the view of his delegation, all countermeasures had to be governed by the same regime. A general obligation for States parties to a dispute to refrain from any act of countermeasures that might aggravate the situation to the point of threatening the maintenance of international peace and security therefor appeared to be indicated.

101. In connection with draft article 13, there seemed to be general agreement that reciprocal measures should not constitute a special category of countermeasures requiring a separate regime. A breach in one area of the law could thus give rise to a countermeasure which was not necessarily related to the obligation breached. Abandoning the requirement of such a link broadened the scope of possible countermeasures, so that the function of limiting the risk of possible abuses now rested exclusively upon the principle of proportionality. That explained the overriding importance of that principle being respected by the injured State. As several members of the International Law Commission had pointed out, the scope and contents of the proportionality rule deserved, for that reason, to be defined with greater precision. In particular, it was necessary to eliminate the risk of States resorting to lex talionis and to provide clear and, if possible, objective guidelines as to the "proportions" of countermeasures. States should be invited to concentrate their attention above all upon the usefulness of the envisaged measure in terms of the purpose aimed at.

102. Draft article 14 was designed to provide for a possible evolution of the category of countermeasures that might be prohibited. The list of prohibited measures should therefore not be given an exhaustive character. Similarly, the risk of a contrario interpretations - to which, in particular, the reference to Article 2, paragraph 4, of the United Nations Charter with regard to the threat or use of force, at present appearing in square brackets, could give rise - ought to be avoided.

103. With regard to paragraph 2 of the draft article, it seemed to be agreed that extreme measures of political or economic coercion could have consequences as serious as those arising from the use of armed force and should therefore be prohibited. However, the adjective "extreme" appeared unnecessary and even tautologous, since any act of political or economic coercion that jeopardized the territorial integrity or political independence of a State was, of necessity, extreme.

104. As to the question of self-contained regimes (paras. 251 to 259 of the report) - in other words, of regimes characterized by the fact that the obligations they set forth were accompanied by special rules concerning the consequences of their violation - Switzerland saw no reason why an injured

(Mr. Godet, Observer, Switzerland)

State unable to obtain the cessation and reparation of an internationally wrongful act by the means provided for in such a regime should be precluded from resorting to countermeasures authorized under general international law. After the exhaustion of amicable settlement procedures, nothing should prevent an injured State from applying countermeasures if the other conditions laid down by the general regime were met.

105. There remained the question of differently injured States, which formed the subject of draft article 5 bis. As the Special Rapporteur pointed out, the bilateral pattern did not hold for the rules of general or collective interest that had to be complied with in the interest of all the States to which they applied. The violation of an erga omnes obligation or of a norm binding upon several States at the multilateral level simultaneously injured all the States bound by that obligation or norm. Since in such a hypothesis the relative injury could vary from one State to another, draft article 5 bis proposed by the Special Rapporteur appeared appropriate. The question could be asked, however, whether, before authorizing a plurality of injured States to react individually, it would not be advisable to encourage them to envisage a collective reaction or to consult among themselves on the countermeasures they proposed to apply, so that their common objective - the cessation and reparation of the internationally wrongful act - might be attained more efficaciously.

The meeting rose at 6.50 p.m.